CONSTITUTIONAL LAW

AN OUTLINE OF THE LAW AND PRACTICE OF THE CONSTITUTION, INCLUDING ADMINISTRATIVE LAW, ENGLISH LOCAL GOVERNMENT, THE CONSTITUTIONAL RELATIONS OF THE BRITISH COMMONWEALTH AND EMPIRE AND THE CHURCH OF ENGLAND

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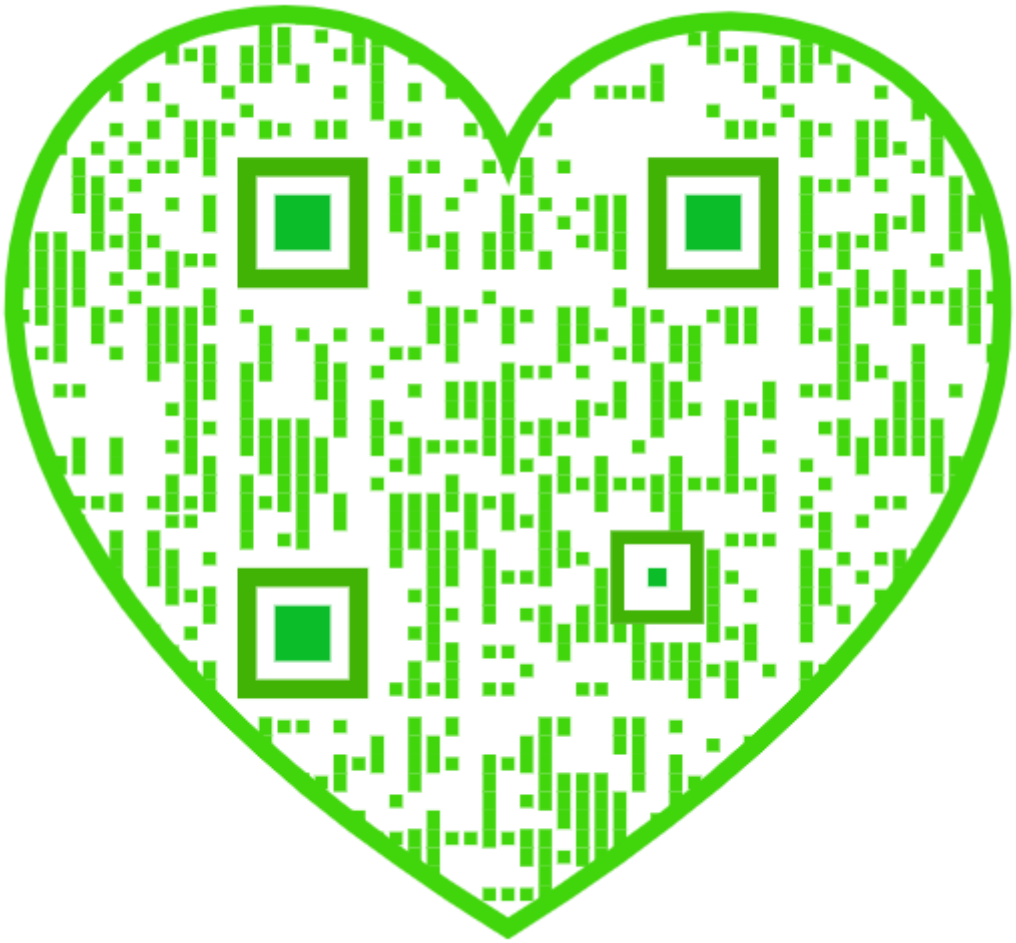

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PREFACE TO THIRD EDITION.

It is fourteen years since the first edition of this book was published. The volume of new material which has accumulated explains the decision to re-write much of the text rather than to make numerous insertions. The task of re-writing has been undertaken by one of us, the other having to abandon much of his intended contribution, as distinct from comment and advice, on account of the claims of national service.

Our publishers required delivery of the manuscript before the end of the war in Europe was in sight. For this reason we have generally refrained from any but incidental references to the constitution under the strain of total war. It was, and still is, too early to say what permanent changes may result in this branch of public law. Few, however, expect to see as a direct consequence of the war fundamental changes in any of the three cardinal features of parliamentary supremacy, ministerial responsibility and judicial independence. This does not mean that evolution of our constitution has ceased. Indeed it would be surprising if, for example, the effect of the adoption by Parliament of the rôle of Council of State for a period of over five years did not leave its mark on future Parliaments. Again, the co-ordination of the executive branch of government has been strengthened by the elaborate but readily adaptable structure of the War Cabinet committee system, and it is unlikely that the cessation of hostilities will reduce the need for such co-ordination. Discussion, however, of these matters is left for the future.

The subjects which in the course of re-casting the text have received most attention are those dealing with general principles (Part II.), the constitutional aspects of administrative law (Part VII.), and the Dominions (Part X.). In particular we hope that the chapters on general principles will cause students less difficulty than in the past, though it is inevitable that they should contain material which the beginner will find less digestible than those parts of the book which describe the machinery of the constitution and the rules of law under which it operates.

We express grateful thanks to Mr. W. K. Carter, Barrister-at-Law, for many valuable suggestions and criticisms, and to Mr. W. L. Walker, Barrister-at-Law, for undertaking the important task of compiling the Index and Tables of Statutes and Cases.

G. G. P.
E. C. S. W.

London,
July, 1945.

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ABBREVIATIONS.

C.L.J. = Cambridge Law Journal.
H.E.L. = *History of English Law*, by Sir William Holdsworth. (Methuen.)
H.L. or H.C. Deb. = House of Lords (or Commons) Debates. (Hansard.)
J.C.L. = Journal of Comparative Legislation and International Law.
J. & Y. = *Constitutional Laws of the British Empire*, by W. I. Jennings and C. M. Young. (Clarendon Press.)
K. & L. = *Cases in Constitutional Law*, by D. L. Keir and F. H. Lawson. 2nd Edition. (Clarendon Press.)
L.Q.R. = Law Quarterly Review.
M.P.R. = Report of Committee on Ministers' Powers, 1932. (Cmd. 4060.)
S.R. and O. = Statutory Rules and Orders.

PART I.

INTRODUCTION.

Law of the Constitution, pp. 1–35, by A. V. Dicey, 9th ed. (Macmillan).
English Constitutional History, Period V, Section K, by F. W. Maitland (Cambridge University Press).
The Law and the Constitution, by W. I. Jennings, 3rd ed. (University of London Press).

CHAPTER 1.

DEFINITION AND SOURCES OF CONSTITUTIONAL LAW.

A.

What is Constitutional Law?

What is a Constitution?

By a constitution is normally meant a document having a special legal sanctity which sets out the framework and functions of the organs of government of a State and declares the principles governing the operation of those organs. Such a document is implemented by decisions of the particular organ, normally the highest court of the State, which has power to interpret its contents. In addition there are gradually evolved a number of conventional rules and practices which serve to attune the operation of the constitution to changing conditions and thereby to avoid, in the main, alterations to a written document which is designed to be permanent in its operation. It is thus that in 1945 a document framed in 1787 remains in force, with few important amendments, as the constitution of the United States of America.

Written Constitutions.

A documentary constitution will normally reflect theoretical beliefs. It is, therefore, not surprising that in our own country, where progress has been achieved less by adherence to philosophical concepts than by the process of trial and error, no written formulae have been embodied in a code of rules for government. Hence there is no constitutional document which can form the starting-point of a student's instruction in the constitutional law of the United Kingdom, and it is said that there exists no written constitution. Nevertheless, without abandoning our instinctive dislike of declaring our political philosophy in terms of law, written constitutions have been framed for British communities overseas in terms of organs and

concrete rules for their operation. It is noteworthy that such constitutions stop short of attempting to enact fundamental concepts in terms of law. Thus they contain no definition of responsible government; they do not guarantee the primary rights of the subject. In effect they provide little more than the machinery of government. They are, however, helpful to the student as showing that the "unwritten" constitution of the United Kingdom can be reduced, at all events in part, to written, *i.e.* specifically enacted, form. With this explanation we can proceed to discuss the question, What is constitutional law?, with special reference to our own country.

What is Constitutional Law?

There is no hard and fast definition of constitutional law. In the generally accepted use of the term it means the rules of law, including binding conventions, which regulate the structure of the principal organs of government and their relationship to each other, and determine their principal functions. The constitutional lawyer is conversant too with the relationship between the citizen and the State, and more particularly with what may be called political relationship rather than economic relationship.

Scope of Text-books.

Logically it is difficult to justify the selection of subjects which are normally covered in text-books on constitutional law. Generally speaking the books deal with the functions of the State in relation to the maintenance of order and the defence of the realm rather than with its expanding activities in the social and economic sphere. It is in regard to the latter that the average citizen comes face to face with the official, in the course of day-to-day administration, but his fundamental freedoms, to use a topical expression, are more likely to be infringed in relation to the maintenance of order. It is in this sphere that the courts are likely to be in conflict with the Executive, and it is to the courts rather than to Parliament that the citizen resorts for the redress of his individual grievances. Accordingly the constitutional lawyer has a particular interest in the means which the law provides for safeguarding individual liberty, whether of the person or of speech. Included in this category are subjects like freedom from arrest and unlawful imprisonment, freedom of expression of opinion, whether by spoken word or writing, by meetings and processions or by exercising free choice as an elector.

Many of the rules and practices under which our system of government is worked are not part of the law in the sense that their violation may lead directly to proceedings in a court of law. Though the constitutional lawyer is concerned primarily with the legal aspects of government, there is required for an understanding of constitutional law some knowledge of the chief features of constitutional history and of the working of our political institutions.

Constitutional Law and Administrative Law.

The exclusion from a work on constitutional law of all but the major features of administrative law [1] is based upon convenience rather than principle. Some limit must be placed upon the contents of a text-book concerned with outlines. The constitutional lawyer can cover only part of the vast field of governmental activities. Thus he will discuss the organisation of government departments and the constitutional status of Ministers and civil servants, but not the details of services such as education or housing. He will discuss the office of Secretary of State and the principal functions of the Home Secretary, including the preservation of order, but not the detailed regulations which govern the police forces. The structure of the principal organs of government will be described, but only principal functions can be treated in any detail in a work on general principles.

B.

Sources of Constitutional Law.

Meaning of Sources.

Reference has been made to those rules of the constitution which lack the direct force of law. These extra-legal rules complicate the task of stating the sources from which constitutional law is drawn. By sources are meant here—though the term is sometimes used to indicate historical origins—the means whereby force and expression are given to law.

Summary of Sources.

The sources of constitutional law are:

(1) *Rules of Law:*
   (*a*) *Statutory, i.e.* Acts of Parliament and the enactments of other bodies upon which Parliament has conferred power to legislate.
   (*b*) *Judicial, i.e.* the decisions of the courts expounding the common law or interpreting statutes.
(2) *Conventional rules, i.e.* rules not having the force of law but which can nevertheless not be disregarded since they are sanctioned by public opinion, and perhaps indirectly by law proper.
(3) *Advisory, i.e.* the opinions of writers of authority.

I.

LEGISLATION.

Meaning of Law.

Rules of law may be defined as "rules of civil conduct recognised by the courts." Such rules, as we have seen, may be divided into two categories: (*a*) those prescribed by legislation, and (*b*) those to be deduced from the decisions of courts of authority.

[1] For meaning of administrative law, see Part VII., Chap. 1.

Unwritten Constitution of Great Britain.

When in the late eighteenth century the constitution of the United States of America was drawn up, definition of the powers of government was regarded as all important and was embodied in a formal document, which was, and is, unalterable save by a process which differs entirely from the method of enacting ordinary legislation. The provision of a constitutional code is a *sine qua non* of every new State, and the principal States of the world have adopted constitutions in the form of definite and comprehensive enactments during the last hundred and forty years. Great Britain is still without a constitution in this sense. Those statutes which are properly regarded as part of constitutional law are not sections of a code. If a collection were made of all the extant enactments (from the Coronation Charter of Henry I. to the present day) which deal with the form and functions of government, the result would present a most imperfect description of the constitution. Moreover, these enactments can each and all of them be repealed by the simple expedient of an Act of Parliament, unlike formal constitutions, which are expressed to be more or less immutable, contemplate no radical changes and usually can only be varied by processes more cumbersome than that of amending ordinary statutes.

Some Principal Statutes.

None the less, although Great Britain has no written constitution, a large part of our constitutional law is based on statutes. The importance of this source of constitutional law can be illustrated by reference to a few statutes of major importance, which, though in law in no different position from any other Acts of Parliament, have always been regarded with peculiar veneration by constitutional lawyers and historians.

Magna Carta.

The importance of the first of them, Magna Carta, 1215, and its numerous confirmations in later years lies not so much in the actual contents, since it preceded the era of representative government, as in the fact that it contained a statement of grievances the settlement of which was brought about by a union of important classes in the community. The Charter set out the rights of the various classes of the mediaeval community according to their different needs. The Church was to be free; London and other cities were to enjoy their liberties and customs; merchants were not to be subject to unjust taxation. The famous clauses which laid it down that no man should be punished except by the judgment of his peers or the law of the land, and that to none should justice be denied, have been described as the origin of trial by jury and the writ of habeas corpus. Trial by jury is, however, to be traced to another source, and the writ of habeas corpus had not yet been devised. But these clauses embody a protest against arbitrary punishment and assert the right to a fair trial and to justice which need not be purchased. The observance of the Charter came to be regarded both by lawyers

and politicians as a synonym for constitutional government. It was the first attempt to express in legal terms some of the leading ideas of constitutional government. [1]

Petition of Right.

The second document is the Petition of Right, 1628, which contained protests against taxation without consent of Parliament, arbitrary imprisonment, the use of commissions of martial law in time of peace and the billeting of soldiers upon private persons. To these protests the King yielded, though the effect of the concessions was weakened by the view Charles I. held that his prerogative powers were not thereby weakened.

Bill of Rights and Act of Settlement.

Some of the provisions of the Bill of Rights, 1689, and the Act of Settlement, 1701, which is to be regarded as complementary to the earlier document, must be set out more fully, inasmuch as they represent the enactment of the settlement reached at the Revolution of 1688.

The Bill of Rights, 1689.

That the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal.

That the pretended power of dispensing with laws or the execution of laws by regal authority as it hath been assumed and exercised of late is illegal.

That the commission for erecting the late court of commissioners for ecclesiastical causes and all other commissions and courts of like nature are illegal and pernicious.

That the levying money for or to the use of the crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal.

That it is the right of the subjects to petition the king and all commitments and prosecutions for such petitioning are illegal.

That the raising or keeping of a standing army within the kingdom in time of peace unless it be with consent of Parliament is against law.

That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.

That election of members of Parliament ought to be free.

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

That excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishments inflicted.

That jurors ought to be duly impanelled and returned and jurors which pass upon men in trials for high treason ought to be freeholders.

That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

And that for redress of all grievances and for the amending, strengthening and preserving of the laws Parliament ought to be held frequently.

[1] *H.E.L.*, Vol. III., p. 215.

The Act of Settlement, 1701.

That whosoever shall hereafter come to the possession of this crown shall join in communion with the Church of England as by law established.

That in case the crown and imperial dignity of this realm shall hereafter come to any person, not being a native of this kingdom of England, this nation be not obliged to engage in any war or the defence of any dominions or territories which do not belong to the crown of England, without consent of Parliament.

That no person who has an office or place of profit under the king or receives a pension from the crown shall be capable of serving as a member of the House of Commons.

That after the said limitation shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established, but upon the address of both houses of Parliament it may be lawful to remove them.

That no pardon under the great seal of England be pleadable to an impeachment by the Commons in Parliament.

The Bill of Rights and the Act of Settlement mark the victory of Parliament. In the place of Kings who claimed to govern by the prerogative we have a constitutional monarchy with the result that government is by and through Parliament.

It is not intended to catalogue the other principal statutes that form part of constitutional law. To illustrate that statute law is still a vital and important source of constitutional law it is sufficient to mention the Parliament Act, 1911,[1] the Statute of Westminster, 1931,[2] and the Ministers of the Crown Act, 1937.[3]

II.

CASE LAW.

The other source of rules of law is the decisions of courts of authority, *i.e.* the superior courts of record, which are stated in authoritative form in the law reports. Judge-made, or judiciary, law is derived from two sources:

(1) The common law proper. This consists of the laws and customs of the realm which have received judicial recognition in the reasons given from early times by the judges for their decisions in particular cases coming before them. In the reports of these cases governing the particular set of facts before the court are to be found authoritative expositions of the law. In the sphere of constitutional law here are to be found much of the law relating to the prerogative of the Crown,[4] the ordinary remedies of the subject against illegal acts by public officers,[5] as well as the remedies by way of judicial order of prohibition, certiorari and mandamus [5] and

[1] P. 96, *post*. [2] Part X., Chap. 3, B., *post*. [3] P. 133, *post*.
[4] Part IV., Chap. 1, C. [5] Part VII., Chap. 4.

the writ of habeas corpus,[1] which affords protection against unlawful invasion of personal liberty by the Executive.

Examples of judicial decisions are *The Case of Impositions* (1606), 2 St. Tr. 371; K. & L. 36, which defined the scope of the arbitrary power of the Crown to impose duties for the regulation of trade,[2] or the modern case which decided how the discretionary powers of the Crown (the royal prerogative) are limited by a subsequent statute conferring similar powers; *Attorney-General* v. *De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508; K. & L. 325.[3] Again, it is a rule of the common law that the King can do no wrong, a rule which enables government departments to a large extent to escape legal liability for the wrongful acts of their employees. This rule depends for its validity on the decisions of the courts.

(2) Interpretation of statute law. The task of the judge is in theory confined to an exposition of the meaning of the enacted law, and in the case of subordinate legislation (statute law made under the authority of Acts of Parliament) also to an enquiry into the validity of the enactment. In practice, however, judges make law by interpretation. Since most of the powers of government departments and local government authorities are derived from statute, this type of judge-made law is of greater importance in the sphere of public law to-day than the common law. Indeed, generally speaking, as legislation increases in volume—and in the nineteenth and twentieth centuries the output of general legislation has been stupendous—the tendency is to confine the work of the courts more and more to the interpretation of statute law.

III.

CONVENTIONS OF THE CONSTITUTION AS A SOURCE OF LAW.

There are many rules and precepts to be mastered by men and women engaged in public life, as well as by students of constitutional law, which are not, at all events directly, part of the law of England in the sense that their validity can be the subject of proceedings in a court of law. In particular, breach of such rules will not result in a civil action or criminal prosecution being directed against the offender. Dicey named these rules conventions of the constitution. Can they properly be called law at all? If the answer is, yes, he argues that they are a source of constitutional law. But other writers regard them as no more than practices which experience shows to be necessary for developing, within the law, existing political institutions. As such they are practices which are regarded as binding.

[1] Part VIII., Chap. 1, A. [2] P. 30, *post*. [3] P. 130, *post*.

Conventions are numerous and vary in character from a rule which is as invariably observed as if it was enforceable by legal process to a practice which will be abandoned when there is a change in the circumstances from which it arose.

There are many important conventions which govern the exercise of the royal prerogative, and in particular the whole system of cabinet government has been evolved without changes in the rules of law (in the narrow sense) by building up a body of rules of conduct which prescribe within the legal framework what is and is not constitutionally proper.[1] Other examples are to be found in the sphere of political relationship between the members of the British Commonwealth, especially the rules governing the relations between the United Kingdom and the Dominions. The law and custom of Parliament contains much that is based on precedent alone and has never been the subject of formal promulgation either by Parliament (itself the highest court of law) or by the Supreme Court of Judicature.

The existence of conventions is thus due to the need for rules to supplement the legal framework of the constitution. Sometimes an Act of Parliament, as did the Statute of Westminster, 1931, or the Ministers of the Crown Act, 1937, may recognise or even reduce to legal form conventional rules. Conventions form a series of rules and practices for the guidance of those who run the machine of government. They are not to be found in the statute book or the law reports. Judges may from time to time recognise their existence, *e.g.* that a Minister of the Crown is answerable to Parliament, but they are not directly required to adjudicate upon their validity or to enforce them by a legal sanction.

The claim of conventions to be considered as part of constitutional law rests largely upon the regularity with which they are in practice followed, and the lawyer must consider the consequences of disregarding them. These consequences are, in the case of Ministers, loss of office or at least of reputation, and in the last resort fear of revolution. In the sphere of Commonwealth affairs secession is the ultimate sanction. But none of these consequences really explain why the conventional rule is normally followed. The explanation lies in the desire to maintain orderly government. Thus the resolve of Ministers to carry with them the House of Commons, as reflecting public opinion, is the principal factor in securing obedience to those conventions which govern the conduct of Ministers.

[1] The terms "constitutional" and "unconstitutional" are not in practice confined to describing obedience to or disregard of conventions as the case may be. The conduct of a Minister is sometimes condemned as being unconstitutional when it involves a breach of law in the narrow sense, *e.g.* acting in excess of authority conferred on him by an Act of Parliament.

Conventions are a mixture of rules based on custom and expediency, but sometimes their source is express agreement. Students must turn to a wealth of material to track conventions to their source; for example, the letters of Queen Victoria, the memoirs of Cabinet Ministers, parliamentary debates, leading articles in the press. Here it will suffice to give three illustrations of conventions as a source of constitutional law.

1. In the sphere of ministerial conduct a Government whose policy in a major matter ceases to command the support of the House of Commons must, through the Prime Minister, either tender its resignation to the King, or seek to reverse opinion in the House of Commons by advising a dissolution of Parliament and so appeal to the electorate to renew their confidence in the Government.

2. In Commonwealth relations the King in all matters appertaining to a Dominion acts on the advice of his Ministers in that Dominion, to the exclusion of seeking other advice in particular from his Ministers in the United Kingdom Government.

3. In the parliamentary sphere the House of Commons will not allow any amendment of a financial provision in a Bill to be made by the House of Lords.

It will be seen that there is common to each of these three rules the desire to take the course which ensures that the will of the electorate will prevail. Such is the nature of responsible government in the democratic way of life.

IV.

TEXT-BOOK WRITERS.

Before leaving the subject of sources, reference must be made to text-book writers. The authority of a legal text-book as a source of law is confined to the extent to which it reproduces the law as enacted by the legislature or decided by the courts. But the lack of interpretation of legislation and the absence of authoritative pronouncements by the courts on matters not covered by legislation are often remedied by the opinions of text-book writers, provided that their reputation stands high. And while these opinions are not law until accepted as such by the courts, nevertheless in the field of constitutional law the scope for pronouncement by text-book writers is larger than in any other branch of law with the exception of international law. This is due partly to the existence of conventions which do not require enforcement through the courts, and partly to the fact that many of the problems of constitutional law are not in practice the subject-matter of litigation, even though they relate to law proper. Thus the duty of the Speaker of the House of

Commons in regard to the certification of money Bills is defined by the Parliament Act, 1911, but it is probably safe to predict that the courts will never be called upon to interpret these provisions. It is left to text-book writers to pronounce upon their effect. More reliance, then, may be placed upon text-books as a quasi-authoritative source than is the case, for example, with the law of contract. It must, however, be borne in mind that unanimity is not to be expected in the views expressed upon controversial topics. Nevertheless, such works as May's *Parliamentary Practice* or Anson's *Law and Custom of the Constitution*, or the critical accounts of the government of the country, such as that given in Bagehot's *The English Constitution*—a masterpiece in its day, and still in many respects not out of date—are consulted with a confidence which the practitioner of law cannot afford to give to text-books on branches of private law, where conclusions must be supported by the authority of a statute or a judicial decision.

Historians.

Writers of text-books on the constitution fall into three classes, namely, historians, political scientists, and lawyers. The historian is apt to stress the value of past experience. While it is not to be suggested that the past does not contain many lessons for the present, particularly in an age when respect for tradition is at a discount, it is equally true that, for example, we can find little that is helpful in understanding the position and working of the present House of Commons in an historical account of the Witenagemot or of the Commune Concilium Regni. On the other hand, a clear appreciation of the seventeenth-century constitutional struggle is necessary for mastering the subject of the royal prerogative as it exists to-day.

Political Scientists.

The political scientist is concerned with the problems of government, as the lawyer is with the rules. The former is naturally attracted by the possibility of deducing abstract principles in relation to the science of government. The task of the student of constitutional law is to master the nature and operations of the existing organs of government rather than to attempt generalisations. Nevertheless, the relation between the theory of government and constitutional law is a close one.

Lawyers.

Lawyers who attempt the task of depicting the law of the constitution are handicapped by the unreality of many of the legal terms which they must of necessity employ. For example, it is a correct statement of law to say that the King is the fountain of justice, or that the King can do no wrong. Yet everybody knows that the King does not sit as judge in his own courts, and that illegal acts are sometimes done in the name of the King by his servants. But the lawyer may claim to be a safe guide to the student, provided that he gives sufficient prominence to the divergence between law and practice in the working of the constitution.

CHAPTER 2.

THE NATURE OF THE CONSTITUTION.

Does the Constitution Exist?

It has been said that the British constitution has no separate existence since it is part of the ordinary law of the land. It is true that there is no special source giving expression to the rules of the constitution in the form of a code which is unalterable save by the act of a special constituent assembly or a specific reference to popular vote. There is, however, a body of law which forms the constitution, partly statutory, partly common law and partly conventional. It would be possible to enact this body of law in the form of a code. Even conventions are capable of enactment. Thus Eire has given statutory authority to the doctrine of ministerial responsibility which in the other self-governing Dominions as in the United Kingdom rests upon convention.

Capacity for Development.

The British constitution is flexible, not in the sense that it is unstable but in that its principles are alterable and constitutional rules can be changed by the ordinary process of an Act of Parliament or the establishment by general acceptance of a new convention. Despite, or perhaps because of, this flexibility the British constitution has escaped those radical changes and convulsions which so frequently occur in countries with rigid constitutional codes.

Process of Evolution.

For over two hundred years the constitution has been adapting itself to new conditions, usually a little behind the trend of expressed contemporary opinion. In the result there has been a complete change almost imperceptible at any given stage, so gradual has been the evolution from the personal supremacy of the monarch to the collective ascendancy of the political executive—a change which has been marked by the retention of existing forms and organs. Much of the structure is now mere form which is tolerated and indeed venerated because it represents historic continuity. The form is, however, remote from the practical working of the constitution. The framework of the constitution has been empirically constructed in marked contrast both to the carefully devised machinery of continental constitutions and to the provisions of the federal constitutions of the United States, of Canada and of Australia.

Constitutional Monarchy and Parliamentary Government.

In the place of kings who governed by the prerogative we have a constitutional monarchy. The King is the head of the State and government is carried on in his name, but it is government by and through Parliament. After the Revolution Settlement of 1689 the King could govern only through Ministers who had the confidence

of Parliament. This, though it was not at first realised, was the result of the Bill of Rights and Act of Settlement. The prerogative of the Crown came to be exercised by responsible Ministers. Successive extensions of the franchise have made the House of Commons more representative, while social and economic changes have involved widespread development effected by statute in the organisation and functions of government. This process of political evolution has avoided becoming a revolution. Parliamentary government is not to be explained solely in terms of law and convention. To quote from the Report of the Joint Committee of Parliament on Indian Constitutional Reform, 1934:

> Parliamentary government, as it is understood in the United Kingdom, works by the interaction of four essential factors: the principle of majority rule; the willingness of the minority for the time being to accept the decisions of the majority; the existence of great political parties divided by broad issues of policy, rather than by sectional interests; and finally the existence of a mobile body of political opinion, owing no permanent allegiance to any party and therefore able, by its instinctive reaction against extravagant movements on one side or the other, to keep the vessel on an even keel.

Functions of Government.

It is customary to divide functions of government into three classes, legislative, executive (or administrative) and judicial. It is not always easy, or indeed possible, to determine under which head an act properly falls, but the organs which mainly perform these functions are distinguishable. In some respects, however, they trespass into each other's sphere or overlap.

The Legislative Function and the Legislature.

The legislative function primarily involves the enactment, after proper scrutiny, of general rules of conduct usually proposed to Parliament by the Executive, but there are types of legislation which determine administrative organisation or procedure rather than prescribe rules of conduct. In the United Kingdom the Legislature consists of the King in Parliament, and Parliament sits in two Houses, the House of Lords and the House of Commons. Since the passing of the Parliament Act, 1911,[1] legislative supremacy is in fact exercised by the House of Commons. The King is an integral member of the Legislature and his assent is required to all Acts of Parliament. As, however, he only acts on the advice of his Cabinet, his assent has been a formality since the development of the principle of ministerial responsibility. A Ministry which has successfully piloted a measure through both Houses of Parliament will never, it may be assumed, advise His Majesty to withhold his assent to that measure becoming law. The power of the House of Lords to reject measures passed by the House of Commons is limited. There is no power to reject

[1] P. 96, *post*.

money Bills, and other public Bills, with the exception of a Bill to prolong the duration of Parliament, can only be delayed for a period of two years. Nevertheless, the House of Lords is still an active part of the Legislature, and important Bills which do not involve political controversy are often introduced in that House. The amount of time devoted by Parliament to the legislative programme seldom exceeds half the number of days in a session, for the Legislature has other functions to perform. There is the grand inquest of the nation where policy and administration are debated. Indeed the primary function of Parliament is the control of the Executive It maintains the Executive in power by endorsing, often with amendment, its legislative programme, and it is ever watchful of administration.

The Executive Function and the Executive.

Although some writers attempt to distinguish between the executive and administrative function by confining the first to matters of policy and the second to administration, there is in practice no true distinction. Administration necessarily raises questions of policy, just as policy can only be implemented by administrative action.

The executive function embraces the direction of general policy. This includes the initiation of legislation, the maintenance of order and the promotion of social and economic welfare, and indeed all administration, though some public services are administered not by the departments of the Central Government, but by local authorities [1] and independent statutory bodies.[2] The majority of the powers of the Executive are to-day derived from statutes, though some of the most important are prerogative powers of the Crown [3] based on common law, *e.g.* the conduct of foreign affairs, the summoning and dissolution of Parliament, appointments to the public services, and the control of the armed forces of the Crown. The King is in law the head of the Executive. The prerogative powers and some statutory powers are vested in the King or the King in Council,[4] but, like those many statutory powers conferred directly upon Ministers, they are in fact exercised by the Government. The Government consists of the King's Ministers who are by convention members of one or other House of Parliament.

The Party System.

The political party having a majority in the House of Commons is entitled to form a ministry. This presents little difficulty when the House of Commons is divided into, broadly speaking, two parties. Twice of late the presence of three different political parties with a substantial representation in the Commons has resulted in the leaders of a party holding ministerial office without that party obtaining a clear majority of seats, and, therefore, of supporters in the House

[1] Part VI., Chap. 2, *post.*
[2] Part IV., Chap. 10, A.
[3] Part IV., Chap. 1, C.
[4] Part IV., Chap. 1 B, *post.*

of Commons, over the other two parties.[1] The great advantage of the two-party system is to ensure that the Government is vigilantly criticised by an opposition which is waiting to succeed to office and therefore criticises with a sense of responsibility. Under a two-party system minority government is impossible.

Coalitions.

Of late years the party system has not been working normally. National Governments composed of members of all or more than one of the major political parties have held office on five occasions since 1918. Their formation has been due to grave emergencies in foreign or economic affairs, which caused party differences to be sunk in the interests of national unity. However inevitable and advantageous this form of government has been, it has resulted in depriving the House of Commons of an effective opposition ready to succeed the Government, and this has undoubtedly weakened the control of Parliament over the Executive.

The Cabinet System.

By convention the King is advised on all matters by the Cabinet. The acts of the King become the acts of his Ministers. The Cabinet consists of the principal Ministers of the Crown, who are invited to sit in the Cabinet by the Prime Minister. A few Cabinet Ministers have no departmental responsibilities, but the majority are entrusted with a particular branch of governmental activity and preside over the government departments staffed by permanent civil servants. Thus as members of the Cabinet the principal Ministers advise the Crown collectively, while individually they are responsible to the King and to Parliament for the conduct of a department. Junior Ministers have departmental duties but are not members of the Cabinet. The Cabinet decides major questions of policy. The departments carry out that policy by administering the law and devising measures to be presented to Parliament for enactment as law. Routine matters are decided in the department without reference to the Cabinet. Inasmuch as the Legislature rarely legislates without the guiding hand of the Government, the Cabinet in practice can prevent any legislation being passed by Parliament which it, or even the Minister chiefly concerned, does not wish to see passed.

Independent Authorities.

In recent years there has been tried the experiment of entrusting a public service to an independent authority set up by Parliament, but not responsible to Parliament through a Minister of the Crown. The Assistance Board for the administration of relief to the able-bodied unemployed and of supplementary pensions to the aged poor is an example of such a body administering a service of a strictly governmental character. Other examples are to be found in the British Broadcasting Corporation and the Central Electricity Board,

[1] In the nineteenth century it was quite common for the Government not to have a majority, *e.g.* Lord John Russell's Ministry in 1846, and Mr. Gladstone's Ministry in 1892–94.

though neither of these bodies provides a service which is necessarily a matter of State provision.

The Judicial Function and the Judiciary.

The judicial function is to declare what the law is and to apply the law with a view to its observance. It usually involves also the ascertainment of facts. The judicial function must be invoked by the subject or by the Executive before it can be exercised. The Judiciary declare the common law and interpret statutes. Certain legislative and administrative functions are also performed by the Judiciary, *e.g.* the enactment of rules of court and the administration of the estates of deceased persons. The courts are the King's Courts, but the King does not exercise justice in person. The final Court of Appeal in the United Kingdom is the House of Lords. The principal court of first instance with general civil jurisdiction is the High Court of Justice, from which an appeal lies to the Court of Appeal and thence by leave to the House of Lords. From the criminal courts of Assizes and Quarter Sessions an appeal lies to the Court of Criminal Appeal and thence on important points of law only to the House of Lords.[1] Judges of the Superior Courts are independent of the Executive. They are appointed by the Crown, but they hold office during good behaviour, being removable by an address from both Houses of Parliament. While, however, the independence of the Judiciary is strictly preserved, many justiciable issues are referred to administrative tribunals instead of to the ordinary courts.[2]

[1] For organisation of the Courts, see Part V, Chap. 1.
[2] Part VII., Chap. 6.

PART II.

GENERAL PRINCIPLES.

Law of the Constitution, by A. V. Dicey, 9th ed. (Macmillan).
Part I.—The Sovereignty of Parliament.
Part II.—The Rule of Law, Chaps. IV., XI. and XIII.
Part III.—The Law and Conventions of the Constitution.
Introduction by E. C. S. Wade, pp. xxv to cxlvi.

The Law and the Constitution, 3rd ed., by W. I. Jennings (University of London Press).

Principles of British Constitutional Law, by C. S. Emden (Methuen).

INTRODUCTORY.

Scope of Part II.

BEFORE examining more closely the organs of government it will be convenient to study four topics which throw light upon every branch of constitutional law. In Chapter 1 of this Part there will be explained the doctrine of the separation of powers. It will be seen that the three functions of government cannot be exercised in watertight compartments. If one organ of government usurped the functions of another, the balance of the constitution would be destroyed, but equally if one organ of government failed to co-operate with another, the constitution would not work smoothly or at all. In Chapter 2 there will be discussed the supremacy of Parliament, the organ of government which exercises the legislative function and under a system of parliamentary government is supreme in that it can in the last resort dismiss the Government which exercises the executive function and in that it makes and can repeal the laws which the Judiciary must interpret. In Chapter 3 there will be discussed the rule of law, the chief feature of the British constitution as expounded by Dicey. In considering how far Dicey's views are applicable to the present day we shall observe the effect upon the constitution of the extension of functions of government since the time when Dicey wrote his famous *Law of the Constitution*.[1] In Chapter 4, under the title, Conventions of the Constitution, there will be explained more fully the nature of the constitutional conventions which have already been mentioned as one of the sources of constitutional law.

The Remainder of the Book.

In Part III. the structure and functions of Parliament will be examined in detail. Similarly in Part IV. there will be examined the structure and functions of the organs of the Central Government,

[1] 1885.

and in Part V. the organisation of the courts. Part VI. outlines the structure and functions of local authorities which share with the Central Government and certain independent statutory bodies [1] the function of administration. In Part VII., Administrative Law, we shall return to those problems (foreshadowed by the study of the separation of powers) which arise from the relationship of one organ of government to another and the exercise by the Executive of legislative and judicial functions. It is here that we shall discuss the chief functions of the Judiciary in relation to public law, which are the control of public authorities by the courts and the interpretation by the courts of administrative law. In Part VIII. there will be examined the fundamental rights of the citizen, freedom of person, freedom of discussion and freedom of public meeting. Part IX. deals with the organisation and discipline of the armed forces of the Crown and the topic of martial law; Part X. with the relationship between the United Kingdom and the Dominions, Colonies and Protectorates; Part XI. with religious bodies and the special status of the established Church of England.

[1] Part IV., Chap. 10, A.

CHAPTER 1.

THE DOCTRINE OF SEPARATION OF POWERS.

Meaning of Separation of Powers.

It has been seen that it is customary to divide the powers of government into three, legislative, executive and judicial. There will now be discussed the doctrine of separation of powers which has played so prominent a part in the theory and practice of constitution making and particularly influenced the framers of the constitution of the United States. To avoid confusion of thought it is important to note that separation of powers may mean three different things: (*a*) that the same persons should not form part of more than one of the three organs of government, *e.g.* that Ministers should not sit in Parliament; (*b*) that one organ of government should not control or interfere with the exercise of its function by another organ, *e.g.* that the Judiciary should be independent of the Executive or that Ministers should not be responsible to Parliament; (*c*) that one organ of government should not exercise the functions of another, *e.g.* that Ministers should not have legislative powers. In considering each of these three aspects of separation of powers we shall consider two quite different questions: (i) How far is there separation of powers in the British constitution to-day? (ii) How far is separation of powers desirable?

Montesquieu.

The doctrine of the separation of powers was first formulated by the French jurist, Montesquieu,[1] who based his exposition on the British constitution of the first part of the eighteenth century as he understood it. His statement of the doctrine has been thus interpreted: If the Executive and the Legislature are the same person or body of persons, there must be a danger of the Legislature enacting oppressive laws which the Executive will administer to attain its own ends. Particularly is this true of a personal Executive, not responsible in law to the courts, or politically to a representative assembly. For laws to be enforced by the same body that enacts them results in arbitrary rule and makes the judge a legislator rather than an interpreter of the law. If the one body or person could exercise both executive and judicial powers in the same matter, he would have arbitrary power which would amount to complete tyranny, if legislative powers also were added to the single powers of that person or body. Montesquieu did not, it may be surmised, mean that Legislature and Executive ought to have no influence or control over

[1] *Esprit des Lois*, Book XI., Chap. 6.

the acts of each other, but only that neither should exercise the whole power of the other.[1]

Separation of Powers practised in U.S.A. rather than in England.

Though the doctrine was based on a study of the constitution of the United Kingdom, it is in the constitution of the United States rather than our own even in the eighteenth century that its influence can best be seen. Montesquieu, viewing the constitution as a foreign observer, saw the triumph of Parliament in 1689 and its achievement of legislative supremacy with the passing of the Bill of Rights. He saw too that the King still exercised executive power and that the independence of the Judiciary was solemnly declared. A provision of the Act of Settlement which was repealed before it came into force had attempted to exclude Ministers from the House of Commons. Before the eighteenth century was over, however, there had been established in England the Cabinet system under which the King governed only through Ministers who were members of and responsible to Parliament. George III. exercised personal rule, but this took the form of influencing Parliament through the distribution of offices and by the control exercised by the Crown and the Crown's supporters over membership of the House of Commons. With the redistribution of seats, including the abolition of rotten boroughs, and the extension of the franchise by the Reform Act of 1832, there disappeared the possibility of government by influence and parliamentary government was securely established.

Checks and Balances.

In many continental constitutions separation of powers has meant an unhampered Executive; in England it means little more than an independent Judiciary. It is in the United States that there is a real division of powers between the three organs and strict adherence to the doctrine of separation of powers. The framers of the American Constitution intended that the balance of powers should be attained by checks and balances between separate organs of government. They imitated the form of the English constitution, not realising that in England executive power was passing from Crown to Cabinet. They were influenced too by the form of colonial charters under which separation of executive and legislative functions was a prominent feature. As in all countries with federal constitutions, there are in the United States fundamental laws which cannot be altered by a simple vote of the Legislature. As a result the Judiciary is not only independent of the Executive, but has the power to declare laws invalid as being contrary to the constitution.

Executive in U.S.A.

In the United States executive power is vested in the President. The so-called Cabinet consists of the heads of the chief departments (twelve in number), each being personally responsible to the President alone for his own department, but not to Congress (Senate and

[1] Jennings, *The Law and the Constitution*, 3rd ed., App. I.; "Separation of Powers," by J. Finkelman, 2 *Toronto Law Journal*, p. 313.

House of Representatives) or to his colleagues. The President holds office for a fixed term; he is not necessarily of the same political party as the majority in either or both Houses of Congress; he is not removable by an adverse vote; his powers are defined.

Legislature in U.S.A.

Neither the President nor members of his Cabinet can sit or vote in Congress; they have no responsibility for initiating Bills or securing their passage through Congress. The President may recommend legislation in his message to Congress, but he cannot compel it to pay heed to his recommendations. He has a veto which has been frequently exercised. Treaties are negotiated by the Executive, but require the approval of a two-thirds majority of the Senate (Upper House). The Senate, though elected, is an undying body, and its membership is renewed partially at stated intervals. The House of Representatives is elected for a fixed term and cannot be dissolved in the interval. The Judiciary (Federal Supreme Court) may declare the actions either of the Executive or the Legislature to be unconstitutional. Despite this rigid demarcation of functions it may be remarked that in practice separation tends to break down.

Contrast between Presidential and Cabinet Systems.

A clear description of the difference between the Presidential system and the Cabinet system, which is due to the adherence on the part of the framers of the United States constitution to the doctrine of separation of powers, is given in the following extract from the pen of the late Earl of Balfour in Bagehot's *The English Constitution* (Introduction to 1928 edition):

> "Under the Presidential system the effective head of the national administration is elected for a fixed term. He is practically irremovable. Even if he is proved to be inefficient, even if he becomes unpopular, even if his policy is unacceptable to his countrymen, he and his methods must be endured until the moment comes for a new election.
>
> "He is aided by Ministers, who, however able and distinguished, have no independent political status, have probably had no congressional (*i.e.* parliamentary) training, and are by law precluded from obtaining any during their term of office.
>
> "Under the Cabinet system everything is different. The head of the administration, commonly called the Prime Minister (though he has no statutory position), is selected for the place on the ground that he is the statesman best qualified to secure a majority in the House of Commons. He retains it only so long as that support is forthcoming; he is the head of his party. He must be a member of one or other of the two Houses of Parliament; and he must be competent to lead the House to which he belongs. While the Cabinet Ministers of a President are merely his officials, the Prime Minister is *primus inter pares* in a Cabinet of which (according to peace-time practice) every member must, like himself, have had some parliamentary experience and gained some parliamentary reputation. The President's powers are defined by the Constitution, and for their exercise within the law he is responsible to no man. The Prime

> Minister and his Cabinet, on the other hand, are restrained by no written Constitution: but they are faced by critics and rivals whose position, though entirely unofficial, is as constitutional as their own; they are subject to a perpetual stream of unfriendly questions, to which they must make public response, and they may at any moment be dismissed from power by a hostile vote."

Lord Balfour proceeds to emphasise the weakness of the President's position through his narrow prerogatives defined by the constitution. The President is unable to influence legislation or taxation in face of a hostile Legislature which he cannot dissolve.

Legislature and Executive.

Enough has been said of the organs of the British constitution and the working of the Cabinet system to make it possible to answer in relation to the Legislature and the Executive the three questions that may be asked in ascertaining whether there is in the constitution a separation of powers:

(*a*) *Do the same persons or bodies form part of both the Legislature and Executive?* The form of the constitution shows the King as the head of the Executive and also an integral part of the Legislature.[1] More important, however, is the convention so essential to the working of the Cabinet government which secures that the King's Ministers should be members of one or other House of Parliament. Their presence in Parliament makes a reality of their responsibility to Parliament and facilitates co-operation between them and the Legislature, both features which are vital to parliamentary government. Only those who are prepared to abandon the Cabinet system and parliamentary government, as we understand it, will criticise this departure from a strict separation of powers.

Parliamentary Supremacy.

(*b*) *Does the Legislature control the Executive or the Executive control the Legislature?* Here again there is no separation of powers. Parliament controls the Executive. Strong government has been combined with responsible government by ensuring that Parliament, while leaving the task of governing to the Government, can insist on the dismissal of a Government which does not obtain parliamentary support for its general policy. Even in the eighteenth century Montesquieu's interpretation was inapplicable in practice. Once it had been established that Parliament alone could make laws and vote taxes, it became recognised, gropingly at first in the reigns of William III. and Anne, clearly under the early Hanoverian Kings, that a Government could only act with strength and speed if it could command the support of Parliament. That support was obtained by entrusting the exercise of the powers of the Crown to Ministers who could command a majority in Parliament. This ensures co-operation between the Government and the Commons.

Influence of Cabinet over Parliament.

To emphasise, however, that Parliament is supreme is not to give

[1] P. 12, *ante*.

the whole picture of the relationship between Legislature and Executive. So long as the Cabinet retains the confidence of Parliament, it tends to exercise the decisive voice in regard to the passage of legislation. Acts of the Legislature must in practice originate with the approval, and normally nowadays on the initiative of the Ministers of the Crown acting in important matters of policy under the direction of the Cabinet. Especially when the House of Commons is divided into only two political parties, the leaders of the majority party who form the Cabinet exercise real control over the House. Parliament can dismiss a Ministry, but a political party is unwilling to vote against its leaders. The defeat of a Ministry involves a dissolution of Parliament and the risk that a general election will result in power passing to the opposition party. Thus while Parliament is supreme in that it can make or unmake a Government, a Government once in power tends to control Parliament. In truth there is no separation of powers, but rather a system which can only work if there is co-operation between Legislature and Executive. If the legislative business of a modern State is to be transacted with speed and efficiency, Parliament must accept the lead of the Government and consent to inroads upon the time of private members. Moreover, modern government has become a business for experts. Parliament cannot perform its legislative functions without the assistance of civil servants to whom are available full sources of information. The official works out the details of a policy which the Cabinet or a Minister has approved. When concrete proposals have been prepared, the parliamentary machine is employed to put the proposals into the form of law. For main principles public approval is necessary. The speeches of Ministers in Parliament and memoranda published before or contemporaneously with a Bill explain the objects of important measures and the methods by which those objects are to be achieved.

Just as Parliament must accept direction from the Government, so the Government must remember that Parliament represents the electorate. A Government which does not take care that its general policy retains the confidence of Parliament risks defeat either in Parliament or when it faces the electorate, which it must do at least every five years.

Three Political Parties.

Where there are more than two main political parties, the Government is less sure of its control over Parliament. It may be necessary in order to secure a majority to form a Government consisting of members of more than one political party. There is a tendency for coalitions to separate into their component parts, each bidding for the support of the third party, thus making it more likely that a Government will be defeated by a hostile vote in Parliament. The Cabinet system has been built up on a two-party system. If for any

lengthy period there are more than two main political parties, there may develop a new relationship between the Government and Parliament.

Delegated Legislation.

(*c*) *Do the Legislature and the Executive exercise each other's functions?* Here we are on debatable ground. The mass of detail involved in modern administration and the extension of the functions of the State to the economic and social sphere has rendered it essential for Parliament to entrust to Ministers the power to make regulations. Statutes must be confined to main principles if Parliament is to have time to produce the volume of legislation required in the modern State. Few would deny that delegated legislation [1] is inevitable. It is, however, generally held that, unless the rule-making power is subject to effective parliamentary scrutiny, there is a real threat to liberty from undue expansion of the power of the Executive. The process of legislation by departmental regulations saves time, can deal with local variations and is more flexible than legislation by Act of Parliament. The power to legislate by regulations is conferred by Parliament and can be taken away by Parliament. Unless, however, the exercise of the regulation-making power is effectively controlled by Parliament, there is lost that safeguard of liberty which depends upon the law-making power being exercised only by the elected representatives of the people who will be affected by the laws that are made. Self-government is endangered when the representatives of the people do not effectively control the making of the laws which the people must obey. It must, however, be borne in mind, when it is said that legislation is the function of Parliament, that the line between legislation and administration is not always easily drawn. The legislative function is the making of general rules. Many Acts of Parliament, especially private and local Acts, decide particular issues and do not lay down general rules. Here Parliament is exercising an administrative function using legislative forms. Such decisions may be entrusted to administrative authorities without any violation of the separation of powers.

Executive and Judiciary.

There must now be examined the relationship between the Judiciary and the other two organs of government. Again the three questions may be asked:

(*a*) *Do the same persons form part of the Judiciary and the Executive?* The courts are the King's Courts, but the King only exercises his judicial functions through his judges. The Judicial Committee of the Privy Council,[2] the highest court of appeal from the Dominions and Colonies, is in form a committee of the Privy Council, an executive organ, but in fact it is an independent court of law. The Lord Chancellor, a Cabinet Minister, presides over the House of

[1] For a full discussion of this topic, see Part VII., Chap. 5.
[2] Pp. 405–11, *post.*

Lords, which is the final court of appeal from the courts of the United Kingdom. Neither, however, of these apparent exceptions to the separation of powers is of constitutional importance. In substance the personnel of the Executive and the Judiciary is separate.

Independence of Judiciary.

(*b*) *Does the Executive control or influence the Judiciary or the Judiciary control or influence the Executive?* In this field the separation of powers is strictly observed. Judicial independence is secured by law and by public opinion, and the standard of conduct maintained by both Bench and Bar. The Act of Settlement [1] determined that the judges of the superior courts should have fixed salaries and hold office during good behaviour subject to a power of removal by the Crown exercisable on an address from both Houses of Parliament. It can be stated with confidence that there is no interference by the Executive with the exercise of their judicial functions by the judges of the Supreme Court. That the independence of the Judiciary is desirable no one will deny. An independent Judiciary is the surest protection against abuse of power. Except in so far as it prevents abuse of power and may direct the performance of legal duties, there is no control of the Executive by the Judiciary. It is an essential function of the Judiciary, if application is made to the courts, to check administrative authorities from exceeding their powers and to direct the performance of duties owed by public officials to private citizens.[2] Only an independent Judiciary can impartially perform these tasks.

Administrative Tribunals.

(*c*) *Do the Executive and Judiciary exercise each other's functions?* It is idle to boast of an independent Judiciary if major justiciable issues are excluded from the jurisdiction of the courts and entrusted to administrative authorities. Statutes sometimes prescribe that orders made by Ministers shall not be questioned in the courts. There is a growing tendency to entrust justiciable issues to administrative tribunals or even to the decision of Ministers. The reasons for this practice, which will be fully examined in Part VII.,[3] are many: the expense of the courts; the belief that lawyers (judges are lawyers) are by their training and outlook unfitted to decide issues involving administrative policy; dissatisfaction with the judicial method of interpreting statutes; the unsuitability of court procedure for the decision of complicated technical issues. There are powerful arguments in favour of the reference of many disputes involving questions of public law to administrative tribunals. On the other hand, it is when the citizen has a dispute with the State that he most

[1] P. 6, *ante*.

[2] For full discussion of the control of public authorities by the Courts, see Part VII., Chap. 4.

[3] Part VII., Chap. 6.

needs the protection of an independent tribunal. There is general agreement that except in times of grave emergency disputes involving freedom of the person and freedom of speech should always be heard by the ordinary courts. In regard to those administrative disputes which arise from the implementation of statutes which involve the entitlement of individuals to statutory benefits, *e.g.* pensions and unemployment insurance or the regulation of trade or use of private property, the solution may well be found in the establishment of administrative courts which will preserve the best features of normal judicial procedure, publicity, reasonable certainty through adherence to precedent, the publishing of reasons for decisions, and yet will be more appreciative of the problems of administration and cheaper for the citizen. It is generally accepted that there should be a right of appeal to an impartial tribunal where an administrative decision rejects a claim to the payment of benefits or deprives an individual of his property. The problem is not a simple one. Just as it is sometimes difficult to draw a line between legislation and administration, so it is often difficult to distinguish between judicial and quasi-judicial or administrative decisions. Many decisions given by judges involve the exercise of discretion, *e.g.* the passing of sentences for crimes or the award of damages. Many administrative decisions involve the settlement of disputes. Primarily the judicial function involves the application of settled law to facts, while a quasi-judicial or administrative decision is primarily determined by the discretion of the administration in applying policy, but the line is often blurred, and frequently the distinction appears one of form rather than of substance.[1] Judges of the High Court perform certain purely administrative functions, *e.g.* the administration of the estates of deceased persons and the winding-up of companies. Justices of the peace [2] still have a few administrative duties surviving from the age when the Justices in Quarter Sessions were the principal local administrative authority. The exercise of such administrative functions by the Judiciary is, however, purely a matter of convenience and does not involve those questions of principle which arise from the exercise of judicial functions by the Executive. Upholders of liberty must watch with anxiety the reference of any disputes involving the fundamental freedoms to tribunals other than the ordinary courts.

Judiciary and Legislature.

Finally there must be examined the relationship between the Judiciary and the Legislature:

(*a*) *Do the same persons exercise legislative and judicial functions?* Generally speaking all the higher judicial appointments disqualify for membership of the House of Commons. The House of Lords, the Upper House of Parliament, is the highest Court of Appeal in

[1] For full discussion, see Part VII., Chap. 1.

[2] P. 195, *post.*

the United Kingdom and also exercises original jurisdiction over peers accused of felonies and those impeached by the House of Commons.[1] The Lord Chancellor presides over the House of Lords sitting in both its legislative and judicial capacities. The Lords of Appeal in Ordinary[1] who sit as judges in the House of Lords occasionally take part also in the legislative business of the House. There is, however, here no substantial infringement of separation of powers. The House of Lords sitting as a court is in substance a court of law with only a historic and formal connection with the House of Lords sitting as a second chamber. Lay peers do not take part in the hearing of appeals.[1]

(*b*) *Is there any control by the Legislature over the Judiciary or the Judiciary over the Legislature?* It has been stated that judges of the superior courts may be removed by an address from both Houses of Parliament. Such an address would, however, never be moved to interfere with judicial independence. The judges interpret the laws which Parliament enacts, but Parliament can alter the law should the decisions of the courts in interpreting statutes or in expounding the common law be contrary to the policy of the Legislature. These, however, are the normal functions of both Legislature and Judiciary.

(*c*) *Do the Legislature and Judiciary exercise each other's functions?* The judicial functions of the House of Lords have already been discussed. Each House of Parliament too has the privilege of the High Court of Parliament of enforcing its own privileges and punishing those who offend against them.[2] In prescribing rules of court the judges of the High Court exercise a legislative function. These instances involve no real departure from the separation of powers.

Since the controversies associated with the name of John Wilkes there have been few occasions when Parliament has encroached on the sphere of the courts. Ministers, however, have recently put forward a novel interpretation of ministerial responsibility to Parliament as a justification for the withdrawal from the courts of issues involving civil liberties. Needs of security during the Second World War made it necessary to give to Ministers powers over individual liberties which could not be questioned in the courts.[3] The grant of such powers was, however, from time to time defended on the ground that it was the duty of Parliament to safeguard liberty and that an individual aggrieved by a ministerial decision should rely upon his Member of Parliament to put forward his grievance. Ministers claimed that being responsible to Parliament they should be judged by Parliament and not by the courts of law. The mere

[1] P. 205, *post*.
[2] Part III., Chap. 4.
[3] Part VIII., Chap. 2.

plea of the interests of the State in time of war was reinforced by the plea that the House of Commons was the judge. The danger of this plea lies in the fact that parliamentary criticism of a Minister may and indeed frequently does result in the issue being made one of confidence in the Government. The Minister relies upon the doctrine of collective responsibility to rally the support of his colleagues and the House of Commons hesitates to defeat a Government because of an unjust decision on a point affecting only one individual. It would be a poor day for liberty if Parliament ceased to protect individual freedoms, but an appeal to Parliament cannot take the place of a right to appeal to the courts and an independent Judiciary. This is no mere war-time danger. The arguments used to justify withholding an appeal to the courts from those detained in war time in the interests of the State have been used to withhold an appeal to the courts from those denied permission to sell milk. There are arguments, as has been shown, for the reference of administrative disputes to specially qualified administrative tribunals, but disputes involving fundamental issues of liberty should be referred to tribunals that are unaffected by political considerations. Access to an independent Judiciary must not be barred on the ground that Ministers are responsible not to the courts but to Parliament.

Conclusion.

There is no separation of powers in the strict sense between Executive and Legislature. Parliamentary supremacy involves control of the Executive. The practical necessities of parliamentary government make it necessary for Parliament to trust the Government to govern and to accept the direction of the Cabinet in regard to the legislative programme, though retaining the right to amend, to criticise, to question and in the last resort to defeat. Practical necessity again demands a large measure of delegation to the Executive of power to legislate by rules, regulations and orders. The independence of the Judiciary has been strictly preserved, but many justiciable issues are referred not to the ordinary courts, but to administrative authorities. It is suggested that, where such reference is expedient, machinery should be devised to secure that reference is made to tribunals which are impartial and preserve the essential features of a fair trial.

CHAPTER 2.

PARLIAMENTARY SUPREMACY.

A.

History of Parliamentary Supremacy.

WE have seen that a system of parliamentary government involves the supremacy of Parliament. Before discussing the legal meaning of legislative supremacy, its practical limitations and how far Parliament in fact exercises its legislative powers, we shall give a brief account of the stages by which Parliament established itself as not only the sole legislative authority, but also as the organ which exercises political supremacy by controlling the Executive. Legislative supremacy was established by the end of the seventeenth century. The responsibility of the Executive to Parliament was not clearly established till after the Reform Act of 1832.

Middle Ages.

It was recognised in the Middle Ages that an Act of Parliament could change the common law. With the Reformation there disappeared the idea that there were certain ecclesiastical rules and doctrines that Parliament could not touch. Henry VIII. and Elizabeth made the Crown of England supreme over all persons and causes and used Parliament to attain this end. Even in the seventeenth century it was contended that there were certain natural laws which were immutable,[1] but the common lawyers were the allies of Parliament in the seventeenth-century struggle with the Crown and in order to defeat the Crown's claim to rule by prerogative were forced to concede that the common law could be changed by Parliament, though by Parliament alone.[2]

The struggle for supremacy.

Legislative supremacy involved not only the right to change the law but also that no one else should have that right. In many spheres the King's prerogative at the beginning of the seventeenth century was undefined and the King exercised through the Council a residue of judicial power which enabled him to enforce his prerogative powers. Acts of Parliament which purported to take away any of the inseparable prerogatives of the Crown were held invalid.[3] The struggle for legislative supremacy is closely connected with the royal prerogative to be discussed in Part IV.

[1] K. & L., pp. 1, 2.
[2] Dicey, *op. cit.*, Introduction by E. C. S. Wade, p. lxix.
[3] K. & L., p. 3; "No Act of Parliament can bar a King of his regality."—*The Case of Ship Money* (1637), 3 St. Tr. 825 *per* Finch, C.J., at p. 1235.

(1) Ordinances and Proclamations.

There was a lack of any clear distinction between the Statutes of Parliament and the Ordinances of the King in Council long after the establishment of the Model Parliament at the end of the thirteenth century. The Lex Regia or Statute of Proclamations, 1539, gave the King wide, but not exclusive, powers of legislating without reference to Parliament by proclamation which had replaced the ordinance as a form of legislation. This statute did not give to the King and Council power to do anything that they pleased by royal ordinance, but was a genuine attempt by the King and Parliament to deal finally with the obscure position of the authority possessed by proclamations. It safeguarded the common law, existing Acts of Parliament, and rights of property, and prohibited the infliction of the death penalty for a breach of a proclamation.[1] Despite the repeal of this statute in 1547, both Mary and Elizabeth continued to resort to proclamations as a means of governing. The judicial powers of the Council, and in particular of the Court of Star Chamber, were available to enforce proclamations. The scope of the royal prerogative was largely undefined. It is a most difficult task for the constitutional historian to say at any given period prior to 1689 exactly what must be enacted by Parliament alone and what could be achieved by prerogative ordinance. Nor is this surprising when it is remembered that legislative power originally lay with the King in Council, and that the influence of the Council varied with the ability of the monarch to choose his counsellors. James I. made full use of this power, with the result that in 1611 Coke was consulted by the Council, along with three of his brother judges who were added at his request, for an expression of opinion on the legality of proclamations. The result of their considerations is to be found in the *Case of Proclamations* (1611), 12 Co. Rep. 74; K. & L. 63, and may be regarded as final.

"1. The King by his proclamation cannot create any offence which was not one before; for then he might alter the law of the land in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment.

"2. The King hath no prerogative but what the law of the land allows him.

"3. But the King for the prevention of offences may by proclamation admonish his subjects that they keep the laws and do not offend them upon punishment to be inflicted by law; the neglect of such proclamation aggravates the offence.

"4. If an offence be not punishable in the Star Chamber, the prohibition of it by proclamation cannot make it so."

A definite limit is thus put upon the exercise of the prerogative.

[1] *H.E.L.*, Vol. IV., pp. 102, 103.

the full force of which was only effective when the Court of Star Chamber and other conciliar tribunals were abolished in 1640. But the existing prerogative powers were left undefined except that in Coke's opinion proclamations could no longer increase them. The gist of the *Case of Proclamations* is that the King is the Executive and his business the enforcement of the existing law; his prerogative is under the law, and Parliament can alone alter the law which the King is to administer.[1]

(2) Taxation. The imposition of taxes is a matter for legislation. Inevitably taxation was a major issue between the Stuart Kings and Parliament. If the Crown could not levy taxes without the consent of Parliament, the will of Parliament must in the long run prevail. It had been conceded by the time of Edward I. that the consent of Parliament was necessary for direct taxation. The history of indirect taxation is more complicated, but it was established by the time of the Wars of the Roses that parliamentary consent was required for taxes on specific commodities. The regulation of foreign trade was, however, a part of the royal prerogative in relation to foreign affairs. There was no clear distinction between the imposition of taxes by way of customs duties and the prerogative powers in relation to foreign trade. There was a conflict of authorities. Parliament was feeling its strength and each side appealed to the law to decide what was really a political issue that had lain dormant so long as Tudor Kings worked in harmony with Parliament. "If it was no part of the Tudor theory of government that emergency powers should be used for the raising of revenue, neither was it a bonâ fide use of the power of the purse to attempt to remove foreign policy or the defence of the realm from the hands of the Crown."[2]

Case of Impositions. In the *Case of Impositions* (*Bates' Case*) (1606), 2 St. Tr. 371; K. & L. 36, John Bates refused to pay a duty on imported currants imposed by the Crown on the ground that its imposition was contrary to the statute 45 Edw. 3, c. 4, which prohibited indirect taxation without the consent of Parliament. The Court of Exchequer unanimously gave a decision in favour of the Crown. The King could impose what duties he pleased for the purpose of regulating trade, and the court could not go behind the King's statement that the duty was in fact imposed for the regulation of trade.

Case of Ship Money. In the *Case of Ship Money* (*The King* v. *Hampden*) (1637), 3 St. Tr. 825; K. & L. 39, John Hampden, Knight of the Shire of Buckinghamshire, refused to pay ship money, a tax levied for the purpose of furnishing ships in time of national danger. Counsel for Hampden conceded that sometimes the existence of danger will justify taking the subject's goods without his consent, but only in actual as opposed

[1] Anson, *Law of the Constitution* (5th ed., Gwyer), Vol. I., p. 343.
[2] K. & L., p. 54.

to threatened emergency. The Crown conceded that the subject could not be taxed in normal circumstances without the consent of Parliament, but contended that the King was the sole judge whether an emergency justified the exercise of his prerogative power to raise funds to meet a national danger. A majority of the Court of Exchequer Chamber gave judgment for the King.[1] The decision was reversed by the Long Parliament, and this aspect of the struggle for supremacy was concluded by the Bill of Rights:

> That the levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal.

(3) Dispensing and Suspending Powers.

The power of the Crown to dispense with the operation of statutes within certain limits seems to have been a necessary one having regard to the scanty wording of many ancient statutes and the irregular meetings of Parliament. So long, however, as the limits upon the dispensing power were not clearly defined, there was here a threat to the legislative supremacy of Parliament: it could be contended that the dispensing power was one of the inseparable prerogatives which could not be curtailed. Violations of the common law or statutory enactments of the common law were probably not within the scope of the royal dispensation. In the leading case of *Thomas* v. *Sorrell* (1674), Vaughan 330; K. & L. 56, a distinction is drawn between dispensing with laws which are not for the particular benefit or safety of third persons and laws which are for such benefit or for the benefit of the public as a whole. In *Godden* v. *Hales* (1686), 11 St. Tr. 1165; K. & L. 55, the court upheld a dispensation from James II. to Sir Edward Hales excusing him from taking the oaths and fulfilling the other obligations imposed by the Test Act. It can be argued that the decision could have been given without impairing the distinction indicated in *Thomas* v. *Sorrell* and by drawing a distinction between *malum prohibitum* (by statute) and *malum in se* from which there can be no dispensation. The judgment was, however, based on wider grounds and it was held that it was an inseparable prerogative of the Kings of England to dispense with penal laws in particular cases and upon necessary reasons of which the King is sole judge.

Fortified by the favourable decision in the latter case, James II. proceeded to set aside statutes as he pleased. Hard though it may be to define the dispensing power, there is no doubt that James overstepped all limits of legality in granting a suspension of the penal laws relating to religion in the Declaration of Indulgence. The validity of his act only came before the courts in an indirect way at

[1] For analysis of the arguments of Counsel and the judgment, see "The Case of Ship Money," by D. L. Keir, 52 *L.Q.R.*, p. 546.

the trial of the Seven Bishops for seditious libel arising out of their petitions to James against reading the declaration. The Bill of Rights abolished the Crown's alleged power of suspending laws.

Comparison should be made with the provision relating to the dispensing power:

> (1) That the pretended power of dispensing with laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.
>
> (2) That from and after this present session of Parliament, no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such a statute, and except in such cases as shall be specially provided for by one or more Bill or Bills to be passed during this present session of Parliament.[1]

It is apparent from these provisions that, while James II.'s dispensations were regarded as illegal, earlier dispensations were not called in question. Further it was recognised that the power might be required by the Executive in future. For this provision was to be made by Parliament. Actually no such provision was made. In the *Case of Eton College* (1815), there was upheld a dispensation granted by Queen Elizabeth to enable Fellows of the College to hold benefices up to a certain value in conjunction with their fellowships, notwithstanding College statutes which forbade this type of plurality.

(4) The Independence of the Judiciary.

So long as the tenure of judicial office depended upon the royal pleasure there was a risk of the subservience of the Bench. Judicial independence is, therefore, closely connected with parliamentary supremacy. No doubt some of the decisions, such as the *Case of Impositions* and *Thomas* v. *Sorrell*, should be accepted without accusing the Judiciary of bias. But it is difficult to absolve the judges who favoured the Crown in *Hampden's Case* or in *Godden* v. *Hales*.

Act of Settlement, 1701.

It was left to the Act of Settlement, enacting a provision which was originally intended to have taken its place in the Bill of Rights, to ensure the independence of the Bench " that . . . judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them." [2]

Earlier the executive power had been checked by the abolition in 1640 of all jurisdiction of the Council in common law matters, and of the Court of Star Chamber which had been used for the enforcement of prerogative powers.

[1] No attempt was made to curtail the prerogative of pardon or the Attorney-General's right to enter a *nolle prosequi* (p. 211, *post*).

[2] Repealed by Statute Law Revision Act, 1881. See now Supreme Court of Judicature Act, 1925, ss. 12, 13; Appellate Jurisdiction Act, 1876, s. 6.

Position end of Seventeenth Century.

The result of the seventeenth-century conflict between the Executive and Parliament was that the Bill of Rights and the Act of Settlement gave to Parliament the supremacy on all points, while preserving the prerogative rights of the Crown in matters which had not been called in question. But as yet there was absent the recognition of the principle that the King's Ministers could best be controlled by their being members of Parliament, and so responsible to Parliament, as well as servants of the Crown. It was not until early in the eighteenth century that their presence in Parliament was recognised to be desirable and, indeed, essential, if the will of Parliament was to prevail. The process of impeachment was too cumbrous and drastic to be used as the everyday method of ensuring that Ministers should not disregard the will of Parliament, but the ultimate solution of Cabinet government was not at first perceived. The Bill of Rights was the first great victory of Parliament. The Act of Settlement by attempting to exclude Ministers showed how far from realisation was the solution of the ultimate problem of co-ordination between the Executive and Parliament.

Eighteenth Century.

In the eighteenth century the nature of the struggle changes. The absolute discretion of the Crown, which the events of the closing years of the seventeenth century had still left in many respects unimpaired, could not be left with the Crown and its Ministers in such a way as to enable them to govern without responsibility in those matters which still fell within the royal prerogative. The significance of the period from 1688 until after the Reform Act, 1832, lies in the development of ministerial responsibility to Parliament.

Ministerial Responsibility.

What was wanted was to bring about the ultimate responsibility of individual Ministers of the Crown to Parliament for their actions, and, secondly, collective responsibility of those individuals as a body for general policy and for the actions of each other.[1] This responsibility is political, and not legal, though for his individual acts contrary to law each Minister was, and is, responsible to the courts. *Danby's Case* (1679), 11 St. Tr. 599, went a long way towards establishing the principle that a Minister cannot shelter himself from legal responsibility by a plea of obedience to the command of the Sovereign: cf. *Somers' Case* (1701), 14 St. Tr. 234.

But the collective responsibility of the Cabinet was as yet not recognised. That body had not emerged as the effective executive organ. Even in the reign of George III. membership of the Cabinet did not by itself entitle a Privy Councillor to take part in decisions on policy. There was a distinction between the efficient or confidential Cabinet, all the members of which received papers, and the outer circle of the Cabinet Council, the titular or external Cabinet. Anne, like her predecessors, retained a personal initiative in the

[1] For fuller treatment of Ministerial Responsibility, see Chap. 4, *post.*

Councils of the Crown, frequently presiding at meetings of the Cabinet, a body which had as yet no regular composition.[1]

Exclusion of Office-holders.

The Act of Settlement at the end of the previous reign excluded the Ministers of the Crown, as holders of offices of profit, from membership of the House of Commons. At the same time it attempted to impose personal responsibility for executive acts on Privy Councillors. It is true that neither of these provisions came into operation, as they were repealed before the death of Anne, but they serve to illustrate the lack of appreciation of the modern solution.

Transition to Cabinet Government.

The real point of transition to Cabinet Government came with the accession of the House of Hanover. The absence of George I. from meetings of the Cabinet made it essential that a Minister should be selected to preside at these meetings. Here is to be found the beginning of the office of Prime Minister. Henceforth the leaders of the two great parties of State, Whigs and Tories, control the direction of policy by maintaining a majority of supporters in the House of Commons. The methods to which both the Whigs and the Tories freely resorted were filling pocket boroughs with their supporters, the grant of pensions and the gifts of sinecure offices and government contracts. The long Whig supremacy illustrates the effectiveness of these weapons. George III. tried through the King's friends to re-establish personal government, but on parliamentary lines. Since the Bill of Rights it was impossible for the Executive to govern without the support of Parliament. As long, however, as Parliament was unreformed, that support could be secured by the use of bribery and patronage, except in times of great popular feeling, as on the occasion of the loss of the American Colonies and the fall of Lord North's Ministry. With the coming of parliamentary reform in 1832 it was no longer possible to govern by these means, and indeed steps had been taken earlier on the initiative of Burke to purge the Commons of corrupt supporters of the Ministry by means of Bills abolishing old offices. The necessity of parliamentary support, which had existed since 1689, meant that the Executive must hold the same political views as the majority in Parliament. Gradually there was evolved an Executive responsive to the will of the people. It is true that at first " the people " meant principally owners of land. To-day it means every adult male and female.

Reform Act, 1832.

Conclusion.

Thus executive power has become impossible without the support of Parliament, which support is only obtainable by winning the confidence of a vast electorate. Parliament has the final voice in

[1] Anson gives three such bodies under titles of: (1) The Cabinet, or Lords of the Cabinet Council. (2) The Committee of Council. (3) The Privy Council or Great Council. Anson, *op. cit.* 4th ed., Vol. II., Part I., p. 104.

legislation, in taxation and in the tenure of office by the judges, and by its vote a Ministry can be forced to resign by the House of Commons. In the past Parliament could not dismiss a King without a revolution. The Commons can now dismiss the Ministry, which advises the King, and ensure its replacement by another pledged to give effect to a policy approved by a majority of the electorate.

B.

Meaning of Legislative Supremacy.

Legal Power Unlimited.

From this brief historical summary we turn to an examination of the practical results of parliamentary supremacy. Dicey, after examining several illustrations from history and showing that there existed no competing authority, concluded that within the limits of physical possibility Parliament could make or unmake any law whatever. The courts can only interpret and may not question the validity of Acts of Parliament. No Parliament can bind its successor; otherwise the supremacy of succeeding Parliaments would be limited. So far as constitutional law consists of statutes, there is no Act which Parliament could not repeal. The Bill of Rights could be cast overboard by the same process as the Rats and Mice Destruction Act, namely by a repealing measure passed in ordinary form. Parliament can override the decisions of the courts, if need be with retrospective effect. It could restore to the Executive unfettered power to legislate as freely as if the *Case of Proclamations* had never been accepted as representing the law. The most firmly established convention could be declared illegal by statute.

Supremacy Illustrated.

That Parliament can pass any law whatsoever and that no one Parliament can be bound by an Act of its predecessors nor bind its successors may be illustrated both by His Majesty's Declaration of Abdication Act, 1936 (this changed the succession to the Throne which had been secured by the Act of Settlement), and by the statutes which have from time to time fixed or prolonged the duration of Parliament's own life. The duration of Parliament has been fixed by successive Acts which each repealed its predecessor, the Triennial Act, 1694, the Septennial Act, 1715, and the Parliament Act, 1911, which is still in force. The Parliament elected in December 1910, was dissolved in 1918 having five times renewed its own existence which was limited to five years by its own enactment, the Parliament Act, 1911. The Parliament elected in 1935 five times renewed its own existence by Prolongation of Parliament Acts.

Indemnity Acts and Retrospect Legislation.

Parliament alone possesses the power to legalise past illegality. This power denies supremacy to the courts and has been used by an Executive which has a secure majority in Parliament to reverse

inconvenient decisions of an impartial Judiciary.[1] The conclusion of the First World War, in the course of which a number of illegal acts were inevitably committed by an over-zealous Executive in the interest of the prosecution of the war, was marked by the passage of two Indemnity Acts, the Indemnity Act, 1920, and the War Charges Validity Act, 1925. There are many other instances of retrospective legislation, *e.g.* Acts validating void marriages, and a recent Act, the Building Societies Act, 1939, s. 3, validating advances made by building societies in excess of their powers. Retrospective laws are, however, "*prima facie* of questionable policy and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law. Accordingly the court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature." [2] Retrospective laws may not only confirm irregular acts but also make void and punish what was lawful when done, *e.g.* Acts of Attainder. Such Acts may be described as *ex post facto* laws rather than as retrospective laws.[2]

Parliamentary Supremacy and the Dominions.

Legislative supremacy means that the validity of an Act of Parliament will not be questioned by those courts which are bound to accept as law the validity of parliamentary enactments.[3] If Parliament made it a criminal offence for a Frenchman to smoke in the streets of Paris, the Act would not be enforced by the French courts, but an English court would enforce it against a Frenchman who came to this country and was prosecuted under it. The legislative supremacy of the Parliament of the United Kingdom (the Imperial Parliament) was formerly recognised throughout the King's dominions (the Dominions and the Colonies) and by British courts in protectorates [4] and those foreign countries in which the Crown exercises jurisdiction.[5] There was, however, a convention that Parliament should not legislate for a self-governing Dominion except at the request and with the consent of that Dominion. This convention was enacted as law by section 4 of the Statute of Westminster, 1931.[6] Does this enactment limit the legislative supremacy of Parliament? The question may be framed differently: Would the courts recognise the validity of a statute passed in contravention of

[1] See Provisional Collection of Taxes Act, 1913, p. 106, *post.*

[2] Willes, J., in *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1; K. & L. 426, at p. 433.

[3] "If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but, so long as it exists as law, the courts are bound to enforce it."—*Lee* v. *Bude and Torrington Rly. Co.* (1871), L.R. 6 C.P. 577, at p. 582.

[4] Pp. 368–9, *post.* [5] P. 369, *post.* [6] Part X., Chap. 3, B, *post.*

section 4 of the Statute of Westminster? Or can Parliament repeal the section? In strict legal theory an affirmative answer can be given to both these questions so far as the courts of the United Kingdom are concerned. "It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains unimpaired; indeed the Imperial Parliament could, as a matter of strict law, repeal section 4 of the Statute. But that is theory and has no relation to realities." [1] The Statute of Westminster did not purport to abrogate the supremacy of the Imperial Parliament. Indeed it expressly preserved the right of the Imperial Parliament to amend the British North America Acts (which contain the Canadian constitution) and to pass legislation affecting the States of Australia.[2] It is, however, open to doubt whether the courts of either Canada or Australia would recognise as part of Canadian or Australian law legislation passed in contravention of section 4. The courts of South Africa would not recognise such legislation as part of the law of the Union. Indeed South Africa no longer recognises the supremacy of the United Kingdom Parliament and has enacted that no Act of the United Kingdom Parliament passed after December 11, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union unless extended thereto by an Act of the Parliament of the Union.[3] In *Ndlwana* v. *Hofmeyer N.O.*, [1937] A.D. 229, the Supreme Court of South Africa described the Union Parliament as the supreme and sovereign law-making body of the Union and characterised as absurd the suggestion that section 4 of the Statute of Westminster could be repealed. "Freedom once conferred cannot be revoked." [4]

Territorial Jurisdiction.

The supremacy of Parliament is not limited so far as British courts are concerned by the rules of international law. The courts have nothing to do with the question whether the legislature has or has not done what foreign States consider a usurpation. Neither are they concerned whether an Act of Parliament is *ultra vires* on the ground that it contravenes generally accepted principles of international law.[5] No statute will, however, be held to apply to aliens with respect to transactions outside British jurisdiction unless the words are perfectly clear.[6] In practice Parliament only enacts legislation which can be enforced and, in accord with international law, attempts to exercise authority only within its own territories,[7]

[1] *British Coal Corporation* v. *The King*, [1935] A.C. 500, at p. 520.
[2] P. 390, *post*.
[3] Status of the Union Act, 1934, s. 2. See p. 383, *post*.
[4] [1937] A.D. 229, at p. 237.
[5] *Mortensen* v. *Peters* (1906), 8 F. (Ct. of Sess.) 93.
[6] *Cail* v. *Papayanni* (1863), 1 Moo. P.C. (N.S.) 471, at p. 474.
[7] Including British ships wherever they may be.

or over British subjects.[1] Indeed our territorial conception of law is stronger than that of most other countries and the extent to which British subjects are affected by English law while in foreign countries is small. Only a few serious crimes committed abroad by British subjects are justiciable in this country, such as treason, murder, manslaughter, bigamy, piracy.[2] Section 18 of the Military Training Act, 1939,[3] empowered the Crown to apply the Act to British subjects ordinarily resident outside Great Britain, and the National Service (Foreign Countries) Act, 1942, empowered the Crown to impose military service on British subjects in foreign countries.

Future Parliaments cannot be bound.

No Parliament can bind its successors. Otherwise succeeding Parliaments would not be sovereign or supreme: *Vauxhall Estates* v. *Liverpool Corporation*, [1932] 1 K.B. 733, where it was held that provisions contained in a later Act (Housing Act, 1925, s. 46), relating to compensation for land compulsorily acquired, repealed by implication the provisions of an earlier Act (Acquisition of Land (Assessment of Compensation) Act, 1919, s. 7 (i)) which attempted to invalidate subsequent legislation so far as it might be inconsistent.[4]

Sovereign and Non-Sovereign Legislatures.

In regard to binding future Parliaments a distinction must be drawn between a sovereign and a so-called non-sovereign legislature. Colonial legislatures are sovereign within the limits of their powers,[5] but are non-sovereign in that they are bound by the Colonial Laws Validity Act, 1865,[6] and other Acts of the Imperial Parliament which apply to the colonies. The Colonial Laws Validity Act, 1865, requires any amendment of a colonial constitution to be made "in the manner and form" required by imperial or colonial legislation in force at the time. The Privy Council held invalid an Act of the New South Wales Parliament which purported to abolish the Upper House of New South Wales in contravention of a previous Act of the same Parliament. This Act had provided that the Upper House might only be abolished by a Bill which before being presented for the royal assent had been approved by the electors at a referendum, and that the requirement of a referendum could only be abolished by the same process.[7] In the High Court of Australia[8] it was suggested that, if a similar provision were enacted in England and a subsequent Bill received the royal assent without a referendum

[1] Other than Dominion nationals. A Dominion national, however, like an alien, is subject to English or Scots law when resident in the United Kingdom.
[2] Sir Arnold McNair, *Legal Effects of War* (Cambridge University Press), 2nd ed., p. 367.
[3] P. 343, *post*.
[4] See also *Ellen Street Estates Ltd.* v. *Minister of Health*, [1934] 1 K.B. 590.
[5] P. 367, *post*.
[6] Pp. 372–3, *post*.
[7] *Attorney-General for New South Wales* v. *Trethowan*, [1932] A.C. 526; see p. 373, *post*, and references cited in footnote, *ibid.*
[8] 44 C.L.R. 394, *per* Dixon, J., at p. 426.

having been held, the courts might be called upon to consider whether the supreme legislative power had in fact been exercised in the manner required for its authentic expression and by the elements in which it had come to reside. It was further suggested that it would be an unlawful proceeding to present such a Bill for the royal assent before it had been approved by the electors and that, if before the Bill received the assent of the Crown it was found possible to raise for judicial decision the question whether it was lawful to present the Bill for assent, the courts would be bound to hold it unlawful to do so. It is, however, submitted that the courts in the United Kingdom would never question the validity of an Act of Parliament which had been duly promulgated. The courts will certainly not consider whether or not prescribed forms have been followed in passing a Bill,[1] nor will the courts enforce an agreement preventing the submission to Parliament of matters which may be relevant to the passage of a Bill.[2] Where it was sought to challenge the validity of a South African Act on the ground that the procedure prescribed by the constitution had not been followed,[3] the Supreme Court of South Africa held that the Union Parliament was a sovereign legislature and that the courts had no power to question the validity of an Act passed by both Houses of Parliament and duly promulgated and published by the proper authority.[4]

No rival authority.

It has been shown in discussing the struggle for supremacy in the seventeenth century that legislative supremacy requires that there should be no rival legislative authority. Neither the Crown [5] nor any one House of Parliament [6] can change the law. Neither devolution nor delegation of legislative authority infringes the supremacy of Parliament. Legislative supremacy does not require that only Parliament should legislate, but it means that other bodies should

[1] "All that the Court of Justice can do is to look at the parliamentary roll; if from that it should appear that a Bill has passed both Houses and received the royal assent, no court of justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in various stages through both Houses": *Edinburgh and Dalkeith Rly. Co.* v. *Wauchope* (1842), 8 Cl. and F. 710, *per* Lord Campbell, at p. 723.

[2] *Bilston Corporation* v. *Wolverhampton Corporation*, [1942] 1 Ch. 391, where the court refused to grant an injunction to prevent the defendants from opposing a local Act in breach of an agreement not to oppose which had itself been embodied in another local Act; see note by Sir William Holdsworth in 59 *L.Q.R.*, p. 2. The Local Government Act, 1933, s. 139, provides that a borough council shall not promote a Bill for the purpose of constituting the borough a county borough unless the population of the borough is 75,000 or upwards. It is, however, submitted that the courts would not interfere to prevent such a Bill being promoted, whatever the population of the borough, but would leave the matter to the vigilance of Parliament.

[3] P. 373, *post*.

[4] *Ndlwana* v. *Hofmeyer N.O.*, [1937] A.D. 229.

[5] P. 30, *ante*.

[6] Pp. 106 and 112, *post*.

only legislate with the authority of Parliament.[1] There has been little enthusiasm in this country for devolution, whether regional (*e.g.* separate legislatures for Scotland and Wales) or functional (*e.g.* an economic legislature elected by trade and professional organisations). That devolution can be reconciled with parliamentary control is shown by the procedure devised for the consideration and passage of measures of the National Assembly of the Church of England.[2] It is recognised that a substantial delegation of legislative powers is inevitable in the modern State. Apart from the legislative powers exercised by local authorities and other bodies with statutory powers, *e.g.* railway companies, wide powers of legislation are delegated to government departments and also to independent government agencies not responsible to Parliament through a Minister of the Crown.[3] Such delegation may in the absence of proper safeguards lessen control by Parliament of legislation, but it does not impair supremacy. Parliament may take away the powers that it has given. Moreover, unless Parliament excludes the jurisdiction of the courts, delegated legislation will be held invalid if the powers conferred by Parliament are exceeded.[4]

Foreign Legislation.

We have considered the territorial limitations upon parliamentary sovereignty and how far the laws passed by Parliament have extra-territorial effect. It is now necessary to consider how far foreign laws are enforced or recognised in the United Kingdom. The courts refuse to investigate the validity of the acts of a foreign State done within its own territory,[5] and will recognise a transfer of property situated in that territory by a decree of that State, should the question of its ownership be raised in litigation here. The meaning and effect of a foreign decree is a question of fact to be determined by evidence. The courts do not recognise the validity of a decree of a foreign State or a foreign law purporting to affect property situated outside the territory of that State.[6]

Second World War.

It is only with the authority of Parliament that foreign jurisdiction

[1] For prerogative legislation see p. 290, *post*.
[2] Part XI, *post*.
[3] Part IV., Chap. 10, A.
[4] Part VII., Chap. 4, *post*.
[5] *A. M. Luther Co.* v. *James Sagor and Co.*, [1921] 3 K.B. 532; *Princess Paley Olga* v. *Weisz*, [1929] 1 K.B. 718. Sir Arnold McNair suggests (*op. cit.*, p. 377) that the courts may investigate the constitutionality as opposed to the validity of the act of a foreign State, but it is submitted that such an investigation will only be made in most exceptional circumstances, *e.g.* where there is involved the freedom of a person living in the United Kingdom or within the protection of the Crown: *In re Amand* (*No.* 2), [1942] 1 All E.R. 236.
[6] *The Jupiter* (No. 3), [1927] P. 122, at p. 144. Possible exceptions are laws affecting the transfer of ownership of foreign ships (McNair, *op. cit.*, p. 378) and requisitioning the property of nationals in time of war (McNair, *op. cit.*, p. 368).

can be exercised in this country. Such jurisdiction was granted during the Second World War to allied Governments in London over their armed forces stationed in this country.[1] In the case of members of the United States forces Parliament abdicated its own jurisdiction over crimes committed in the United Kingdom; United States of America (Visiting Forces) Act, 1942. Parliamentary supremacy was not infringed when the Crown permitted the exiled Netherlands Government to legislate in the United Kingdom for its own subjects: *In re Amand* (*No.* 2), [1942] 1 All E.R. 236. International law recognises that a State may legislate in respect of its own subjects wherever they may be, and it mattered not whether such legislation was enacted in Holland or in the United Kingdom. It could, however, only be enforced in the United Kingdom through the authority of Parliament. Amand, a Netherlands subject, was called up for military service by a Netherlands decree made in the United Kingdom. He was arrested in pursuance of an Order in Council made under the Allied Forces Act, 1940, which gave to the Netherlands authorities jurisdiction over their armed forces in the United Kingdom and lent assistance in enforcing that jurisdiction. The Divisional Court recognised that a valid Netherlands decree could apply to Netherlands subjects in the United Kingdom; but it was an Act of the United Kingdom Parliament and an Order in Council made thereunder that made Amand liable to arrest and detention and thus gave enforceability to the Netherlands decree.[2]

Interpretation of Statutes.

The seventeenth-century struggle for supremacy left its mark upon the interpretation of statutes by the courts. The common lawyers have always resisted any encroachment by the Executive. In *Attorney-General* v. *Wilts United Dairies* (1921), 37 T.L.R. 884, there was held invalid a charge imposed by the Food Controller during the First World War as a condition of the grant of a licence to deal in milk. The High Court referred to the "historic struggle of the legislature to secure for itself the sole power to levy money upon the subject," and held that express words were required for any delegation of the power to tax.[3] The courts will not question the supremacy of Parliament, but it was understood by the lawyers when they allied themselves with Parliament that the common law should be preserved, and this understanding has influenced the

[1] P. 341, *post.*

[2] McNair, *op. cit.*, p. 374.

[3] For an instance of a wide delegation of taxing power, see p. 94, *post.* Though the Crown may not without parliamentary sanction levy a charge in return for the performance of a public duty, payment may be demanded for the performance of a service which cannot be demanded as of right, *e.g.* the provision of protection by armed forces for merchant vessels in foreign waters: *China Navigation Co.* v. *Attorney-General*, [1932] 2 K.B. 197.

interpretation of statutes to the present day.[1] Judicial interpretation of public law will be discussed in Part VII., but some leading principles of interpretation may be mentioned here to illustrate how loath the Judiciary has hitherto been to construe a statute as changing the basic principles of the common law.[2] Express terms are required to take away the legal right of the subject to compensation in respect of property compulsorily acquired: *per* Lord Atkinson in *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co. Ltd.*, [1919] A.C. 744, at p. 752. There is a presumption that Parliament does not intend to deprive a subject of his right of access to the courts in respect of his common-law rights: *Chester* v. *Bateson*, [1920] 1 K.B. 829; K. & L. 21, where during the First World War it was held that a regulation debarring any person from applying to the courts without the consent of the Minister of Munitions to recover possession of premises occupied by a munitions worker was not validly made under a power to issue regulations for preserving the public safety and the defence of the realm. Express and clear words are required to effect any major constitutional changes: *Nairn* v. *University of St. Andrews*, [1909] A.C. 147; K. & L. 5, where at a time when women were not enfranchised generally it was held that express words were required to confer the vote on women graduates of a Scottish university, and that they could not be enfranchised by the use of the words "every person."

Political Limitations.

We have hitherto considered territorial limitations on parliamentary supremacy and the legal meaning of the term. There are also practical political limitations. It is essential to the working of a parliamentary democracy that the laws made by the representatives of the people should be obeyed. It follows that laws must not be enacted that would prove unenforceable owing to their being repugnant to the moral sense of the people. In theory, but not in practice, Parliament could enact a law condemning all red-haired males to death or making attendance at public worship illegal.

Consultation of Interests affected.

So too the immense complexity of the business of government makes it necessary that, while preserving its supremacy, Parliament should exercise it only after the major interests affected have been consulted. The modern State regulates the whole life of the community. The initiation of legislation is the function of the Executive, but prior consultation of major interests affected is an essential part of the legislative process. Indeed it is not uncommon in the case of delegated legislation for Parliament expressly to provide for consultation between a Minister and the organisations

[1] K. & L., pp. 4–6; Dicey, *op. cit.*, Introduction, p. lxix and footnote 1.

[2] "That principle of construction is now, I apprehend, discredited," "Liberty and the Common Law," by Lord Wright, 9 *C.L.J.*, p. 3.

representing interests to be affected by the making of regulations. Legislation affecting industrial life is not passed without consultation with the major industrial organisations of employers and employed —employers' associations and trade unions. Such consultation ensures that legislation is passed with adequate knowledge of the problems involved and that Parliament is aware in advance how far it will secure the co-operation essential for its enforcement. It is of the highest importance that the persons or bodies consulted should be truly representative of the interests concerned, but not all interests —especially consumers—are organised. Similar consultation takes place before the passage of legislation directly affecting the professions, *e.g.* doctors are consulted in regard to proposals for a National Health Service; the Bar Council and the Law Society before the introduction of measures changing legal procedure. Numerous measures necessitate the co-operation of local authorities which is secured in advance by consultation between the Ministry of Health and such bodies as the Associations of Municipal Corporations and of County Councils. There is a tendency for the Executive to face Parliament with "agreed measures." But consultation does not mean that the bodies whose advice is sought can dictate policy. It is for the Minister to weigh up that advice and to present the policy of the Government to Parliament. The practice of consultation is one of the factors which have prevented any tendency to the establishment of any rival to Parliament in the form of functional devolution. An economic Parliament elected by sectional interests might easily become a rival claimant for supremacy. Consultation must not be allowed to hamper Parliament in reaching final decisions. No dictation to Parliament must be tolerated. Parliamentary democracy would not work if a minority attempted to influence national action, *e.g.* in the sphere of foreign policy, by organised obstruction or strikes.

Parliament and the Electorate.

Finally there must be mentioned the responsibility of Parliament to the electorate, the political sovereign. Some constitutions provide that constitutional changes shall only take effect with the consent of the electorate obtained by a referendum (a poll of the electorate). The referendum need not be confined to constitutional issues. Other constitutions provide for the initiative—a device to enable the electorate to instruct Parliament to proceed with a measure. Our constitution does not find a place for any machinery of direct democracy. Legislative supremacy is not shared with the electorate. None the less, though the power exists, no Parliament, save in an emergency, would prolong its own life, and at regular intervals the electorate exercises its political supremacy by the choice of representatives. Parliament accordingly exercises its legislative supremacy with its responsibility to the electorate in mind. History has

shown that Parliament is always sensitive to public opinion. Even in the eighteenth century when Parliament was not a truly representative assembly, public opinion made itself felt in times of national crisis, *e.g.* the dismissal of the Fox-North coalition and the call to power of the younger Pitt. Experience of direct democracy shows that the voter when confronted by an isolated issue on a referendum is slow to favour any change in the *status quo*. Parliamentary government makes for more flexible government and probably for truer and more effective concern for the public interest of the community as a whole.

CHAPTER 3.

THE RULE OF LAW.

THE supremacy or rule of law has been since the Middle Ages a principle of the constitution.[1] There is much truth in the contention that " principles of the constitution " are only " political principles." The rule of law had a different interpretation under weak Lancastrian monarchs than under the Tudors. " Unconstitutional " may mean merely " contrary to tradition," but " the principles of 1689 have become part of the accepted theory of democracy " and " in the political sphere there is much in the Whig philosophy with which any democrat will agree, and which is, therefore, an accepted and, one might almost say, permanent part of the constitution." [2] New proposals must be examined on their merits, and it is no sufficient argument against them that they are contrary to the traditional interpretation of the rule of law. It is, however, a sufficient reason for subjecting them to close examination.

History of the Rule of Law.

In the Middle Ages the theory was held that there was a universal law which ruled the world. Bracton, writing in the first half of the thirteenth century, deduced from this theory the proposition that rulers were subject to the law. We have seen [3] how the alliance between common lawyers and Parliament had a decisive effect upon the seventeenth-century contest between Crown and Parliament. That alliance had its roots in the later Middle Ages. Mediaeval lawyers never denied the wide scope of the royal prerogative, but the King could do certain things only in certain ways. It was not until the seventeenth century that Parliament established its supremacy, but Fortescue, C.J., writing in the reign of Henry VI., had already combined what later became the two major principles of the constitution—the rule of law and the supremacy of the Parliament—and relied upon the rule of law to justify the contention that taxation could not be imposed without the consent of Parliament. With the rise in the sixteenth century of the modern territorial State the mediaeval conception of a universal law which ruled the world gave place to the conception of the supremacy of the common law. The abolition in 1640 of the Court of Star Chamber ensured that the principles of the common law should apply to public as well as private law. The rule of law meant the

[1] For historical summary, see *M.P.R.*, pp. 71–73.
[2] Jennings, *The Law and the Constitution*, 3rd ed., p. 296.
[3] Pp. 29–33, *ante*.

supremacy of all parts of the law of England, both enacted and unenacted. The supremacy of the law together with the supremacy of Parliament were finally established as part of the Revolutionary Settlement of 1689.

Dicey's exposition of the Rule of Law.

Of all writers on the constitution since Blackstone the most influential has been the late A. V. Dicey, whose lectures delivered as Vinerian Professor of English Law at Oxford and first published in 1885 under the title *Introduction to the Study of the Law of the Constitution* [1] have been studied by successive generations of statesmen, lawyers and a large section of those interested in public life. The constitutional law of 1945 differs in many respects from that of 1885, but the influence of Dicey remains a real force and there is no better way of distinguishing between the permanent and impermanent features of our constitution than by examining the principles of the constitution as expounded by Dicey and determining how far they hold good to-day. Of those principles which Dicey expounded that which has had most influence and at the same time has received most modern criticism is his exposition of the rule of law.[2]

Committee on Ministers' Powers.

One of the terms of reference of the Committee on Ministers' Powers appointed by the Lord Chancellor in 1929 [3] was to report what safeguards were desirable or necessary in respect of the legislative and judicial powers of Ministers in order to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law. It was understood that what was meant by the supremacy of the law was the principle expounded by Dicey.

First of Dicey's three meanings of the Rule of Law:

Absence of Arbitrary Power.

Dicey gave to the rule of law three meanings: "it means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government . . . a man may be punished for a breach of law, but he can be punished for nothing else." [4] This interpretation conveyed that no man is punishable or can be lawfully made to suffer in body or goods, except for a distinct breach of law established in ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with systems of government based on the exercise by persons in authority of wide arbitrary or discretionary powers of constraint.

[1] 9th ed., with Introduction by E. C. S. Wade (Macmillan), 1939.

[2] The reader should study Dicey, *op. cit.*, Chaps. IV., XII. and XIII., and Introduction, pp. lxvii to xciv; Jennings, *The Law and the Constitution*, 3rd ed., Chap. II.; and "Constitutional Government and the Rule of Law," by G. Godfrey Phillips, *J.C.L.*, 3rd series, Vol. XX., pp. 262 *et seq.*

[3] Part VII., Chap. 1, *post.*

[4] *Op. cit.*, p. 202.

Second meaning of the Rule of Law: Subjection of Officials to the Ordinary Courts.

The rule of law " means, again, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts." [1] In this sense the rule of law conveys that no man is above the law; that officials like private citizens are under a duty to obey the same law; and (though this does not necessarily follow) that there is no system of administrative tribunals to which are referred claims by the citizen against the State or its officials.

Droit Administratif.

Dicey contrasted the rule of law with the *droit administratif* of France. He was at pains to contrast the disadvantages involved by a system of administrative law and administrative courts to judge disputes between officials and citizens with the advantages enjoyed by Englishmen through the absence of such a system. He did not properly appreciate the working of the French system of *contentieux administratif*.[2] This was indeed the only part of *droit administratif* with which he dealt. Nor did he pay much attention to the wide powers of the Executive which existed in England even in his day.[3] The law which regulates the powers and duties of public authorities and officials in this country is as much administrative law as the *droit administratif* of France.[4] But, even if Dicey misinterpreted the meaning of *droit administratif*, his emphasis upon equality before the law served to stress that fundamental liberties can be protected by the common law—that police law is not law, and that freedom requires a legal system which protects essential liberties.

Third meaning of the Rule of Law: Constitution the result of the ordinary Law of the Land.

Finally the rule of law as expounded by Dicey means " that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts, that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land." [5] By this is meant that the legal rights of the subject, *e.g.* his freedom of action and speech, are secured not by guaranteed rights proclaimed in a formal code but by the operation of the ordinary remedies of private law available against those who unlawfully interfere with his liberty of action, whether they be private citizens or officials. A person libelled may sue his defamer. Free access to courts of justice is an efficient guarantee against wrongdoers.

Each of these three meanings of the rule of law will be examined. How far Dicey's exposition was true of Dicey's time is primarily

[1] Dicey, *op. cit.*, p. 202–3.
[2] Dicey, *op. cit.*, 9th ed., Appendix, Section I. (4).
[3] But see Introduction to 8th edition and his article " Administrative Law in England," 31 *L.Q.R.*, 148.
[4] Part VII., Chap. 1, *post.*
[5] Dicey, *op. cit.*, p. 203.

a question for the legal historian. We shall consider how far Dicey's exposition is true to-day in order to ascertain how far, if at all, the conception of the rule of law has a permanent value as a principle of the constitution.

Arbitrary Power and Discretionary Authority distinguished:

Absence of Arbitrary Power.

In considering Dicey's first meaning of the rule of law a distinction must be drawn between arbitrary power and discretionary authority. It is still an essential principle of constitutional government in the United Kingdom that there should be no arbitrary power to arrest or punish. It may be argued that, provided the law authorises the punishment of those who in the opinion of the Judiciary, or even the Executive, have acted in a manner contrary to the interests of the State, there is nothing contrary to the rule of law in inflicting such punishment. This, however, is to deny any real meaning or value to the conception of the rule of law. What is authorised by law cannot be illegal, but it may be contrary to the rule of law as a principle of constitutional government.[1] The essential feature of Dicey's first meaning of the rule of law remains a feature of the constitution to-day, viz. that, so far as punishment for offences is concerned, the citizen can foresee the consequences of his conduct and will not be punished save for a breach of the ordinary law. He will, moreover, be tried in the ordinary courts. The law of England knows nothing of exceptional offences punished by extra-ordinary tribunals. There are no special courts for the trial of crimes against the State. Judges have power to adjust sentences to the gravity of offences and the circumstances and past records of offenders. Maximum sentences for specific crimes are, however, laid down by law for nearly every criminal offence. The common law crime of public mischief provides dangerous scope for judicial discretion,[2] but in general so far as major crimes are concerned the law—whether common law or statute law—is fixed and can be ascertained.

"The Ordinary Law."

When Dicey referred to "ordinary law," he had in mind the common law or law enacted in Acts of Parliament. To-day criminal law includes innumerable punishable offences which are created by statutory regulations. It is important that the individual should have the assurance that the law can be ascertained with reasonable certainty. A person who takes the trouble to consult his lawyer ought to be able to ascertain the legal consequence of his actions. The bulk and detail of the regulations enacted by government departments undoubtedly creates uncertainty.[3] The power to create offences must be delegated because the needs of the modern State require that innumerable regulations be made and enforced.

[1] See review by Sir William Holdsworth of E. C. S. Wade's Introduction to Dicey in 55 *L.Q.R.*, p. 585.

[2] *The King* v. *Manley*, [1933] 1 K.B. 529; see "Public Mischief," by W. T. S. Stallybrass, 49 *L.Q.R.*, 183.

[3] Dicey, *op. cit.*, 9th ed., Introduction, p. lxxiv.

In order, however, to secure as far as is practicable conformity with the rule of law provision must be made for simplicity, publication and accessibility. As the result of parliamentary pressure the importance of these factors was drawn to the attention of all government departments in April 1943.[1] It is, however, highly desirable that there should be more parliamentary counsel,[2] so that the drafting of regulations may receive the same care as that of statutes. In another respect too the growth of delegated legislation touches upon the principle of the rule of law. There is a close connection between the rule of law and parliamentary supremacy. So long as criminal law was based on either common law or statute law a man was only punishable for a breach of law which was either based on the ancient custom of the country or was enacted by the representatives of the people. If offences are to be created by regulations made by government departments or subordinate bodies, it is essential that there should be scrutiny by Parliament to ensure conformity with the will of the people as expressed by its representatives. The need of such scrutiny was recognised in 1944 when there was appointed a select committee of the House of Commons to scrutinise those classes of delegated legislation which are required to be laid before Parliament.[3]

Group Law.

While as a citizen a man is subject only to the ordinary law, he may also be subject to the special law affecting his particular calling which may be enforced by special tribunals. The armed forces are subject to military law in addition to the ordinary law of the land, and offences against military law are triable by courts-martial.[4] The clergy are subject to ecclesiastical law enforced by the ecclesiastical courts or other special tribunals established by statute.[5] Solicitors are subject to the disciplinary powers of a statutory body composed of members of the profession, with a right of appeal to the High Court. The General Medical Council may erase a doctor's name from the Medical Register. Provided that there is no imposition of arbitrary punishments and that ordinary judicial methods are observed, " group law " is not inconsistent with the rule of law. Courts-martial follow legal forms and observe strict rules of procedure. A recent extension of " group law " is, however, open to criticism. Provision has been made by statute [6] to enable a substantial majority of persons engaged in a particular branch of agriculture to frame a scheme for the organisation of their industry which has the force of law and is binding on all producers in the industry concerned whether they voted for or against the proposal. Schemes provide for the establishment of marketing boards elected

[1] *H.C. Deb.*, 5th Series, Vol. 389, cols. 1646–1669.
[2] P. 101, *post.*
[3] Part VII., Chap. 5, *post.*
[4] Part IX., Chap. 2, *post.*
[5] Part XI., *post.*
[6] Agricultural Marketing Acts, 1931–33; *cf.* Coal Mines Act, 1930, and Herring Industry Acts, 1935–44.

by the industry concerned which are given full powers of control over the production and marketing of a particular commodity. These powers include the power for the board itself to punish for a breach of the provisions of a scheme. Marketing boards have been criticised on the ground that they are in the position of prosecutor, judge and jury in their own cause; that their chairmen are usually without legal qualifications; and that they do not follow normal rules of procedure and evidence. A departmental committee has recommended [1] that allegations of offences should be heard by small disciplinary committees presided over by an independent chairman with legal qualifications, and that provision should be made for an appeal from a disciplinary committee to the High Court on a point of law.

Discretionary Authority.

We must now consider discretionary authority as opposed to arbitrary power. If it is contrary to the rule of law that discretionary authority should be given to government departments or public officers, then the rule of law is inapplicable to any modern constitution. When Dicey wrote the first edition of his *Law of the Constitution*, the primary functions of the State were the preservation of law and order, defence and foreign relations. The exercise of discretionary authority in these spheres did not touch directly upon the citizen's daily life, nor did it frequently give rise to cases in the courts. To-day the State regulates the national life in multifarious ways. Discretionary authority in every sphere is inevitable. A citizen can still so regulate his conduct that he can in general foresee whether he is likely to appear as a defendant in a criminal court. A citizen cannot foresee how far the State will interfere with his freedom to enjoy his property. A piece of land may be compulsorily acquired for some vital national purpose not known at the time when the land was purchased. A time comes when the upkeep of a private road will be assumed by ratepayers as a public charge. Discretion to determine when that time has come must be given to someone—in this case the local authority. Again, a borough may have too many public houses and some must be closed as redundant. No one can with certainty foresee which houses the licensing justices will classify as redundant. It is a matter for their discretion exercised *bonâ fide* and quasi-judicially, but none the less it is a discretion. It is this absence of foreseeability which has caused a critic to suggest that planning is inconsistent with the rule of law.[2] His view is that the rule of law means that " government in all its actions is bound by rule, fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will

[1] Report of the Departmental Committee on the Imposition of Penalties by Marketing Boards and Other Similar Bodies, 1939, Cmd. 5980.

[2] *The Road to Serfdom*, by F. A. Hayek (Routledge), Chap. VI., " Planning and the Rule of Law."

use its concise powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge." Such certainty is not attainable in modern conditions. The rule of law, however, demands that, so far as is practicable, where an individual plans his affairs reasonably with due regard for public welfare, he shall receive compensation, if he suffers damage as the result of a change in the law or the exercise of a discretionary authority granted in the general interest. To enable the citizen to foresee as far as possible the consequences of his actions and as a safeguard against arbitrary officials the grant of discretionary authority should prescribe the general lines on which it should be exercised. Discretionary power does not mean arbitrary power.

Powers of Public Officers.

Dicey's second meaning of the rule of law also requires careful examination. "Equality before the law" does not mean that the powers of the private citizen are the same as the powers of the public official. Here it will suffice by way of illustration to mention that the powers of arrest possessed by police constables are, and always have been, wider than those of private citizens. It is not contrary to the rule of law that special powers should be given to public officers to enable them to perform their public duties.[1] What the rule of law requires is that powers should be defined by law and that any abuse of power or other wrongful act by public officers should be subject to control by the courts in the same way as any wrongful act committed by a private citizen. The orders of the Crown or of a superior officer are no defence to a prosecution for a crime or a civil action in respect of a wrong.[2] This is what Dicey meant by "equality before the law."[3]

It is not inconsistent with the principle of "equality before the law" that, as we have seen, certain groups of the community, *e.g.* soldiers[4] and clergy[5] are subject to laws which do not affect the rest of the community, because those laws apply to all members of a particular calling. They are subject like others to the general law, though they incur additional liabilities as well as privileges by reason of their calling.

Qualifications to Dicey's Second Meaning.

Even with this explanation Dicey's second meaning of the rule of law requires qualification in two major respects: (1) The Crown and other public bodies and officers are given (by law) certain privileges and immunities from the operation of the ordinary law which governs redress for wrongs committed by private citizens.

[1] Powers are sometimes conferred directly upon officials, but more frequently the powers exercised by officials are conferred either upon the Crown or upon Ministers or other public authorities. They are inevitably exercised through officials of the department or authority concerned.

[2] For the position of soldiers acting under orders, see Part IX., Chap. 2, B., *post*.

[3] Dicey, *op. cit.*, p. 194.

[4] Part IX., Chap. 2, *post*.

[5] Part XI., *post*.

(2) Many judicial issues affecting private rights are to-day decided not by the courts of justice, but by administrative tribunals or even by Ministers.

Immunities and Privileges.

(1) *Immunities and Privileges.*—In discussing Dicey's first meaning of the rule of law we considered the special powers of public officers, but it was stressed that these powers must be exercised in accordance with law. We must now consider not special powers but special privileges and immunities given to public bodies or officers who exceed their legal powers or act wrongfully.

(*a*) *The Immunities of the Crown in Litigation.*—The subject of legal proceedings by and against the Crown (which means against government departments) is discussed in Part VII., Chapter 3. The Crown is in a special position in regard to both contracts and torts. By substantive law the Crown may not contract so as to fetter its future executive action and any contract which would so fetter the Crown is void. Servants of the Crown may, unless a statute otherwise provides, be dismissed at pleasure. Where there is an enforceable claim against the Crown for breach of contract or detention of property, it must in general be enforced not by an ordinary action, but by the cumbrous process of Petition of Right. The Crown may not be sued in tort, for the King can do no wrong, nor in general can an action be brought against a government department in respect of wrongs committed by its staff. Neither the Crown nor the head of a department is vicariously liable, as is an ordinary employer, for the wrongs done by subordinates in the course of their employment. Individual Crown servants are liable for their own wrongful acts and State necessity is no defence for an illegal act,[1] but the disabilities of the subject when seeking redress from a government department form a real exception to the rule of law and have been judicially described as discreditable to our constitution.[2] It has been said that, inasmuch as State necessity is no defence for a wrongful act against a citizen, there is in England no distinction between public and private law,[3] but such a distinction is in fact created by the special law relating to proceedings against the Crown.

(*b*) *Personal and Proprietary Immunities of Foreign States, their Rulers and Diplomatic Agents.*—These immunities do not free those who enjoy them from legal liability as such, but exempt them from process in English courts: *Dickinson* v. *Del Solar*,

[1] *Entick* v. *Carrington* (1765), 19 St. Tr. 1030.
[2] *Minister of Supply* v. *British Thomson Houston Co.*, [1943] K.B. 478.
[3] K. & L., p. 59.

[1930] 1 K.B. 376. So long as the immunities were only claimed by foreign monarchs and their diplomatic representatives in respect of their personal misconduct, they could hardly be regarded as sufficiently important to form a serious exception to the rule of law; but modern States engage in trade; their vessels are State property, which, as such, has been held exempt from process; *The Parlement Belge* (1880), 5 P.D. 197; *The Porto Alexandre*, [1920] P. 30.[1] Moreover, the Diplomatic Privileges Extension Act, 1944, has extended diplomatic immunity to several quasi-governmental international organisations and their officials.

(*c*) *Trade Unions.*—The Trade Disputes Act, 1906, s. 4 (1), prohibits the bringing of any action against a trade union in respect of a tort. This rule applies whether the trade union is sued in its own name or through its officers. It has always been impossible to bring an action against an unincorporated body as such, *e.g.* social clubs and many charitable institutions, though individual members or officers are, of course, liable for wrongful acts in which they take part: *Hardie and Lane Ltd.* v. *Chiltern*, [1928] 1 K.B. 663; but it was held (prior to the Trade Disputes Act, 1906) that an action could be brought against trade unions, which were given special statutory privileges not enjoyed by other unincorporated associations;[2] *Taff Vale Railway* v. *Amalgamated Societies of Railway Servants*, [1901] A.C. 426. A trade union can, to a limited extent, sue and be sued on its contracts, and an action for tort can be brought against individual members, unless acts normally wrongful are protected by some other statutory provisions, *e.g.* section 3 of the Trade Disputes Act, 1906, which removes liability for inducing a breach of contract, provided the act done is in contemplation or furtherance of a trade dispute. The immunity of trade unions is an immunity from all actions for tort and is not confined to acts done in contemplation or furtherance of a trade dispute; *Vacher* v. *London Society of Compositors*, [1913] A.C. 107. The trustees of a union may be sued in relation to union property vested in them provided that the action does not relate to a tortious act committed by or in behalf of a union in contemplation or furtherance of a trade dispute.

[1] The House of Lords upheld this ruling in respect of a merchant vessel requisitioned for public purposes, but has left open the question of the immunity of a State-owned trading ship, *Compania Naviera Vascongado* v. *S.S. Cristina*, [1938] A.C. 485, see p. 181, *post*.

[2] See Trade Union Act, 1871, which provided that the purposes of a trade union should not be deemed unlawful merely because they might be in restraint of trade and gave to trade unions a limited legal capacity.

(*d*) *Statutory immunities and privileges of public bodies and officials.*—There will be discussed in Part VII., Chapter 2, those statutes which grant immunity to public officials in respect of acts done *bonâ fide* in the course of their duties and also the Public Authorities Protection Act, 1893, which restricts the right to take proceedings against public bodies or officials.

(*e*) *Judicial Immunity.*—In Part V., Chapter 2, there will be considered the immunity of judges from actions arising out of their performance of their judicial duties. This immunity may be regarded as a necessary safeguard of impartial justice rather than as an exception to the rule of law.

(2) *Special Tribunals.*—It is as true to-day as when Dicey wrote that officials are not exempted from the jurisdiction of the ordinary courts and that, as we have seen, the law of England knows nothing of exceptional offences punished by extra-ordinary tribunals. There are no special courts for the trial of crimes against the State or of civil claim against officials. There are, however, as has been mentioned in discussing the separation of powers, and will be considered more fully in Part VII., Chapter 6, many special tribunals for the decision of issues which may affect vitally the proprietary rights of citizens, or their entitlement to benefits.

Special tribunals appointed by Ministers, or even Ministers themselves acting through civil servants may determine questions of insurability; [1] what compensation shall be paid for the compulsory acquisition of land; [2] whether a dairy farmer may sell milk.[3] How far is the existence of such special tribunals contrary to the rule of law? It is submitted that the rule of law is satisfied, provided that the tribunals are impartial and independent; that every man is heard before a decision is given affecting his rights; that reasons are given for decisions and reasonable regard is paid to precedent. It is inconsistent with the rule of law that a judicial issue should be decided by a Minister interested in carrying out a policy affected by the issue to be decided.[4] Judicial decisions not referred to the ordinary courts should generally be entrusted to a tribunal with a chairman with legal qualifications, and on points of law there should be provision for an appeal to the courts, *e.g.* whether or not an individual comes within the definition of

[1] Unemployment Insurance Act, 1935, s. 4: see p. 301, *post.*

[2] Acquisition of Land (Assessment of Compensation) Act, 1919, s. 1; the arbitrators are selected from a panel appointed by a special Reference Committee: see p. 317, *post.*

[3] Food and Drugs (Milk and Dairies) Act, 1944, s. 1: see p. 302, *post.*

[4] The whole question of special tribunals, their merits and demerits, is discussed in Part VII., Chap. 6, *post.*

an insured person. The essential requirements are, however, that decisions should be impartial and that those who give them should not be liable to pressure from the Executive.

Dicey's Third Meaning of the Rule of Law.

Finally there must be examined the third meaning of the rule of law, viz. that private rights depend not upon a constitutional code, but on the ordinary law. Dicey is here referring not to the mass of rights derived from statutes, *e.g.* pensions, insurance, or free education, but to the fundamental freedoms—" the common law of the constitution "—freedom of the person, freedom of speech, freedom of association. The citizen whose fundamental rights are infringed may seek his remedy in the courts and will rely, not upon a constitutional guarantee, but on the ordinary law of the land. The right to personal freedom is protected by the writ of habeas corpus, the right of self-defence and the right to bring an action or a prosecution for wrongful arrest, assault or false imprisonment.[1] Freedom of speech means that a man may write or say what he pleases provided that his words are not treasonable, seditious, blasphemous or contrary to the law of defamation (libel or slander).[2] The writ of habeas corpus existed at common law, but was made effective by the Habeas Corpus Acts of 1679 and 1816. The right to arrest is governed partly by common law, partly by statutes, *e.g.* the Criminal Justice Act, 1925, s. 44. The law of libel is primarily common law, but various statutes give special privileges to the Press, *e.g.* Newspaper Libel and Registration Act, 1881. The Public Order Act, 1936, is an important part of the law of public meeting.[3] The ordinary law may prove a more effective protection than constitutional guarantees contained in a written constitution which may be suspended in times of emergency.[4] " The unwritten constitution of England consists of a set of legal principles gradually evolved out of the decisions of our Courts of Justice in individual cases." For this reason there must be watched jealously any encroachment upon the jurisdiction of the courts and any restriction on the subject's right of access to them. " By any such encroachment the principal safeguard provided by the constitution for the maintenance of the subject's rights is impaired." [5]

Conclusion.

The rule of law remains a principle of our constitution. It involves the absence of arbitrary power; effective control by Parliament of and proper publicity for delegated legislation particularly when it imposes penalties; that when discretionary power is granted the manner in which it is to be exercised should as far as is practicable

[1] Part VIII., Chap. 1, *post.*
[2] Part VIII., Chap. 3, *post.*
[3] Part VIII., Chap. 3, *post.*
[4] Note the very limited effect of the so-called Habeas Corpus Suspension Acts; Dicey, *op. cit.*, pp. 229–32.
[5] *M.P.R.*, p. 73.

be defined; that every man should be responsible to the ordinary law whether he be private citizen or public officer; that private rights should be determined by impartial and independent tribunals; and that fundamental private rights are safeguarded by the ordinary law of the land. If this be accepted, it is only necessary to contrast the state of affairs in the totalitarian States, with their apparatus of secret police and people's courts administering not law, but the orders of dictators, in order to answer affirmatively the question—does the rule of law to-day remain a principle (despite some exceptions) of the constitution?

CHAPTER 4.

CONVENTIONS OF THE CONSTITUTION.

> " Constitutional law creates obligations in the same way as private law, but its reactions as to persons possessed of political power are extra-legal: revolutions, active and passive resistance, the pressure of public opinion. The sanction is derived from the threat of these consequences."—Vinogradoff, *Outlines of Historical Jurisprudence*, Vol. I., p. 120 (Clarendon Press).

What is a Convention of the Constitution?

IN discussing conventions as a source of constitutional law it is desirable first to examine the nature of the obligation and then to consider the sanction which takes the place of enforcement by a court in the case of private law and indeed of that part of public law which is contained in rules of law proper. The term " convention " has been accepted, largely through the influence of Dicey,[1] to describe obligations of this kind, whether the rule derives from custom, agreement or expediency. There is, however, no necessary connection with the notion of express agreement in the sense in which the term is used by international lawyers. Dicey discussed the rules for the exercise of the royal prerogative by the King's Ministers and those governing the relations between the two Houses of Parliament, rules based on custom or expediency rather than resulting from any formal agreement. Nowadays conventional rules have a wider ambit and govern (*inter alia*) the relations between the various member States of the British Commonwealth. Since the Statute of Westminster, 1931, the rules governing the competence of a Dominion Parliament to legislate are statutory, though the Statute gave effect to much that had hitherto rested on agreement. But otherwise the relations between the Dominions and the United Kingdom are based upon agreement, *i.e.* on conventions formulated at Imperial Conferences which have been subsequently adopted by the various Governments.[2]

Inadequacy of Legal Rules.

As well in the sphere of high policy as in the work of routine administration modern government demands a high degree of flexibility. In the case of an enacted constitution changes can be achieved by constitutional amendment, but amendment is normally difficult to procure, and in practice many changes are brought about without formal modification. In this process interpretation by

[1] *Law of the Constitution*, 9th ed., Chap. XIV.; and see Introduction, pp. xcv *et seq.*

[2] *Report of Conference on Operation of Dominion Legislation*, 1930, pp. 19, 20, Cmd. 3479.

the courts of the written law plays its part, though not always in the direction of adapting the law to present needs, but evolution by conventional rules is equally important. In the United Kingdom the legal framework of executive government has been adapted to other ends than those which it formerly served without any change in the law, not by judicial interpretation, for which opportunity seldom occurs where there is no enacted constitution, but by the growth of conventional rules. In this way has the Executive, the servant in law of the Crown, become subject to Parliament and through the House of Commons to the electorate, its political overlord. The whole conception of constitutional monarchy was thus developed without destroying the legal powers of the Crown, other than those doubtfully claimed by the Stuarts. Again parliamentary government means not merely that there is a legislature with capacity to enact all laws, but co-operation between Ministers and Parliament secured by rules which are largely conventional and are enforced by political rather than legal sanctions. Fear of loss of office or of reputation is the ultimate sanction which causes Ministers to observe this part of constitutional law, rather than fine or imprisonment. Equally, expectation of office and political repute ensures obedience from the Opposition.

Scope of Conventions.

The complexity of modern government has caused innumerable statutory duties to be entrusted to the Executive. The older powers are still exercised in the name of the King, though convention entrusts them to Ministers. Modern statutes recognise the convention and confer the legal powers on individual Ministers in many, but not in all cases. Hence it may be expected that the importance of conventions in the executive sphere will diminish. "Conventions are rules for determining the mode in which the discretionary powers of the Crown (or of Ministers as servants of the Crown) ought to be exercised." [1] So wrote Dicey sixty years ago. He was concerned to establish that conventions were "intended to secure the ultimate supremacy of the electorate as the true political sovereign of the state." He was therefore mainly concerned with rules governing the use of the prerogative. When Parliament gives a Minister discretionary power, that power is exercised by him as a matter of law, but it will none the less be a discretionary power exercised on behalf of the Crown. The convention which confers individual and collective responsibility upon Ministers operates to secure that in the exercise of legal powers conferred upon him by statute a Minister shall be as responsible to Parliament as if he were exercising under convention a prerogative power which is in law the sole responsibility of the Crown. But it is not only in the sphere of the discretionary powers of the Executive

[1] Dicey, *op. cit.*, pp. 422–23. See Introduction, 9th ed., pp. xcv–xcvii.

that conventions are an important source of constitutional law, and a fuller examination of their contents and application is required.

The Sovereign; Choice of Prime Minister.

The King acts upon the advice of his Ministers, whether members of the Government of the United Kingdom or members of the Government of one of the Dominions, where most (and in the case of the Union of South Africa all) of his powers are delegated to a Governor-General. But there are some matters which fall to be determined by the exercise of his personal judgment, and in particular the appointment of a Prime Minister, and in some circumstances the dissolution of Parliament. In neither case need he, nor normally would he, act without advice, but in the event of the death of a Prime Minister while still in office, it is obvious that the King would be deprived of one of the sources of advice which he would normally seek. There are conventional rules which limit his range of choice. The support of the party or coalition which may be expected to command a majority in the House of Commons is a condition precedent to acceptance of the office. It is perhaps safe to say that membership of the House of Commons is another. At all events no peer has held the office since Lord Salisbury resigned in 1902, and the choice of Mr. Baldwin (as he then was) in preference to Lord Curzon in 1923 may be regarded as establishing that no peer could again accept the office, so long as the House of Lords is constituted as at present. The practice of the Sovereign first consulting the leader of the Opposition when a Government tenders its resignation on defeat in the Commons is well established and ensures the impartial position in politics which a constitutional monarch should occupy. Yet the ultimate decision is the personal responsibility of the Sovereign, and in his task of selection precedent is not conclusive, and therefore the conventions lack the binding force which they possess in other fields. This does not mean that they can normally be disregarded, but that unforeseen circumstances may deprive them of their force on a particular occasion.

Dissolution of Parliament.

Closely connected with the choice of a Prime Minister is the power to dissolve Parliament. Here the King is by convention bound to accept the advice of the Prime Minister, since the alternative is to dismiss him and with him all his ministerial colleagues, a step which would inevitably involve the King in political controversy. There could be no justification for the dismissal against its will of a Ministry which commanded a majority in the House of Commons, save on the ground that the majority no longer reflected the will of the electorate. A dissolution is the orthodox means of testing this. When a minority Government holds office, the position is more complicated, but here again it is for the Prime Minister to choose the occasion for appealing to the electorate. Should he persist in retaining office despite his rejection by the

electorate, the King might be forced into the position of having to dismiss him, but it is safe to say that he would only do so on the advice of the leader of an opposition party prepared to take office in his place. A similar situation could arise if a Prime Minister who had failed to obtain the support of the new House of Commons after a dissolution demanded a second dissolution in the hope of solving the deadlock. Convention, in the sense of a rule based on expediency, thus prescribes the proper course for the Sovereign to take.

The Cabinet.

A number of the conventional understandings which Dicey, quoting from Freeman's *Growth of the English Constitution*, cited as belonging to "the code by which public life in England is (or is supposed) to be governed" are closely connected with the prerogative of dissolution which has just been mentioned.[1] For example, "a Cabinet when outvoted on any vital question may appeal once to the country by means of a dissolution," or "If an appeal to the electors goes against a Ministry, they are bound to retire from office and have no right to dissolve Parliament a second time." There is, however, one convention upon which rests the whole doctrine of ministerial responsibility—"The Cabinet are responsible to Parliament as a body for the general conduct of affairs," as Freeman put it. It is impossible to exaggerate the importance of understanding the consequences of this rule, which is the foundation of parliamentary government as it is known throughout the British Commonwealth. For this reason it is selected as the single illustration of the operation of conventions in relation to Cabinet government.

Meaning of Ministerial Responsibility.

Ministerial responsibility has for the constitutional lawyer two distinct meanings, the one strictly legal, the other, which is under consideration here, purely conventional in the sense that it is no part of the law as applied by the courts. It is as well first to explain the former meaning, which is an integral part of the law. Holders of office under the Crown (and Ministers all have this status) are personally liable in law for their acts. Moreover, as the King can do no wrong and so cannot be held responsible for executive actions, every act of the Crown must be done through a Minister who can be made responsible and, if necessary, sued. Acts requiring the King's participation must be authenticated by a seal for the custody of which a particular Minister is responsible, or be recorded in documents bearing the counter-signature of a Minister. The use of the various seals, with forms for recording the royal assent, is regulated partly by statute and partly by custom.[2] When it is said that Ministers are personally liable in law for their acts,

[1] Dicey, *op. cit.*, 9th ed., p. 416.
[2] Anson, *op. cit.*, 4th ed., Vol. II., Part I, pp. 62–72.

this means that they are responsible for acts which they commit or sanction in their individual capacity; they are not liable for the acts done in course of duty by their subordinates, who are in law not their servants, but fellow-servants of the Crown. In early times this liability was confined to officers of low status. Impeachment was used against the holders of the great State offices, though for a while under the Tudors it fell into disuse, as responsibility was regarded as being solely to the King and not to the law. By the end of the seventeenth century it was firmly established that no official, high or low, could plead the orders of the Sovereign when charged with a breach of the law. This rule of responsibility to the law has not been successfully challenged since the Act of Settlement provided that a royal pardon could not be pleaded in bar of an impeachment, *i.e.* to prevent a person being brought to trial by this procedure. The King can do no wrong, but those who commit wrongs in the course of executing the King's business are personally liable.

Development of Collective Responsibility.

To return to the conventional meaning of ministerial responsibility, it is not the fear of legal liability, but the desire to operate the machinery of government on constitutional lines which influences Ministers in their conduct of affairs and their relationship with Parliament. Accordingly there has been evolved since 1688 the rule of collective responsibility which rests upon convention alone. During the greater part of the eighteenth century the Cabinet was still a body of holders of high office whose relationship with one another was ill defined, and thus the body remained irresponsible to Parliament. The Government was the King's Government in fact as well as in name, and the King acted on the advice of individual Ministers. The advice tendered by a Minister might, or might not, agree with that acceptable to his nominal colleagues, some of whom were seldom, if ever, consulted by their Sovereign. Apart from the relatively homogeneous Ministries under Walpole's pre-eminent leadership Cabinets were formed of different groups with many different aims; this made collective responsibility impracticable. Moreover, the King sometimes consulted those who were out of office without the prior approval of his Ministers. Eventually the Representation of the People Act, 1832 (the great Reform Bill), brought realisation that for the future the Executive must hold the same political views as the majority in Parliament. The support of Parliament could no longer be secured by the expedients of sinecure offices, pensions, the gift of seats in rotten boroughs, and such-like devices which had not shocked eighteenth-century political morality. The Cabinet, all its members united by party ties, became the definite link between the King and Parliament and so acquired the whole control over the direction of public affairs.

Thus collective responsibility developed later than the political responsibility of individual Ministers. Just as it became recognised that a single Minister could not retain office against the will of Parliament, so later it became clear that all Ministers must stand or fall together in Parliament, if the Government was to be carried on as unity rather than by a number of advisers of the Sovereign, acting separately.

What Collective Responsibility Involves.

By the middle of the nineteenth century collective responsibility, as it is understood to-day, was firmly established. Lord Salisbury said in 1878:[1] "For all that passes in Cabinet every member of it who does not resign is absolutely and irretrievably responsible and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues. . . . It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet, who, after a decision is arrived at, remains a member of it, that the joint responsibility of Ministers to Parliament can be upheld and one of the most essential principles of parliamentary responsibility established."

This statement explains why it is essential to draw the veil of secrecy over all that passes in Cabinet even in times when the requirements of security do not necessarily impose the ban of silence. It is impossible to preserve a united front, if disclosures are permitted of differences which have emerged in arriving at a decision.

Collective responsibility does not require that every Cabinet Minister must take an active part in the formulation of policy, nor that his presence in the Cabinet room is essential whenever a decision is taken. His obligations may be passive rather than active when the decision does not relate to matters falling within his own sphere of administrative responsibility. He must, however, be informed beforehand of what the proposal is and have an opportunity of voicing his doubts and objections. The size of modern Cabinets (in peace time) would alone seem to preclude active participation by each Minister in forming conclusions. A body of some twenty or more is too large for effective committee work, but in the nature of things Ministers in Cabinet are, or should be, concerned more with decisions of principle rather than detail. Collective responsibility does, however, mean that a Cabinet Minister, and his Parliamentary Secretary, must vote with the Government in Parliament and, if necessary, be prepared to defend its policy. Neither in Parliament nor outside can a Minister be heard to say that he is in disagreement with a Cabinet decision, or for that matter with a decision of a colleague taken without reference to the Cabinet.

Individual Responsibility.

The individual responsibility of a Minister to Parliament is more positive in character. Each in his own sphere bears the burden of

[1] *Life of Robert, Marquis of Salisbury*, Vol. II., pp. 219–20.

speaking and acting for the Government. When a Minister announces that His Majesty's Government have decided that they are prepared to take a certain course of action, it does not follow that the decision has been referred to the Cabinet. No doubt it would have been on a fundamental issue ; but if the decision relates exclusively to the sphere for which the Minister is responsible, it must be at his discretion whom he chooses to consult beforehand ; it is in the exercise of that discretion that he decides to act without previous reference to his Cabinet colleagues. Nowadays so complex are results of governmental action that it is safe to assume that the practice of prior inter-departmental consultation is firmly established at all levels, and the experience of war should serve to ensure that there is no relapse into departmental isolationism. Be this as it may, a Minister knows that he will ultimately have to rely upon the support of his Cabinet colleagues if political criticism becomes vocal, and he must temper his decisions by reference to that consideration.

Ministers and the Civil Service.

While collective responsibility ensures that the King's Government presents a united front to Parliament, individual responsibility in its political meaning ensures that for every act or neglect of his department a Minister must answer. Hence the rule of anonymity in the Civil Service is important. For what an unnamed official does, or does not do, his Minister alone must answer in Parliament and the official, who could not be heard in his own defence, is therefore protected from attack. This positive liability of a Minister is essential to the performance by Parliament, and more particularly by the House of Commons, of its rôle of critic of the Executive. No Minister can shield himself by blaming his official. Nor can he throw responsibility on a ministerial colleague, once it is established that the matter under consideration is the responsibility of his own department. This responsibility under modern conditions may not be easy to determine, and there are many arguments in favour of rationalising the machinery of government, so that the lines of demarcation of functions, and therefore of responsibility, may be more clearly marked. Those who see virtue in associating standing committees of Parliament with the work of government departments are faced with the argument that the existence of such committees, even though in theory their functions would be advisory and not executive, would detract from ministerial responsibility and hinder the exercise of criticism in Parliament itself.

Ministerial Responsibility in War.

Thus far the doctrine of ministerial responsibility has been discussed without reference to what has happened twice in the present century to meet the exigencies of the two World Wars. The institution late in 1916 and again at the outbreak of war in 1939 of a War Cabinet has raised some interesting questions. Hitherto what has been said

about collective responsibility has assumed the existence of a body of Ministers all sharing equally, whether their number be twelve or twenty-four, responsibility for the direction of public affairs and acting together under the stimulus of an effective Opposition in Parliament. What happens then to the doctrine when the Cabinet consists of some five to nine senior Ministers, while other Ministers (including in the First World War all the Ministers with departmental responsibilities, except the Chancellor of the Exchequer) have no seat in the Cabinet, though they are invited to attend when matters affecting their departments are considered? On both occasions the normal number of departmental Ministers was considerably increased by the necessity for setting up new departments arising out of the demands of war.

On one view it can be maintained that only the members of a War Cabinet are collectively responsible, together with such other Ministers as may have been called into consultation for a particular decision. Against this it may be said that the Ministers who are not members of the War Cabinet have delegated for the time being the power to take decisions to their colleagues in the War Cabinet and thereby pledged themselves to stand or fall by what the Cabinet decides, although they may have had no right or opportunity of voicing their point of view beforehand.

The question is perhaps of academic interest only. In war a Government must take rapid decisions. A team of as many as forty Ministers, some of them stationed abroad, others chosen not on account of political experience, but by reason of business capacity for a war job entrusted to a highly specialised department, could not conceivably function as a supreme executive sitting together on every occasion. Unity is secured by the urgency of the danger; political differences may be suppressed for the time being. The absence of regular opposition in Parliament reduces to a minimum the chances of effective challenge. In these circumstances it is unlikely that a clear definition of the position of Ministers outside the War Cabinet can emerge. The question would only become one of practical importance if and when a similar type of Cabinet held office in times when the parties were divided on traditional lines.

The Civil Service.

It is the law that all servants of the Crown can be dismissed at the pleasure of the Crown. This rule is only enforced against civil servants in cases of misconduct or gross inefficiency, for convention requires that civil servants shall remain in office, despite a change of Government. There is thus ensured continuity in the operation of the administrative machine, and without it something like chaos might follow with each change of Ministry. Ministers, who so far as their legal status is concerned are, like civil servants, servants

of the Crown, may in the last resort be dismissed on political grounds, though they normally go out of office on the Prime Minister tendering his resignation or resign on account of a difference of opinion with their colleagues. Political considerations never justify the dismissal of a civil servant, but such a step, though unconstitutional, would undoubtedly be legal. Here then is an example of the way in which a convention can restrict the operation of a rule of law. It is a corollary of this convention that a civil servant must abstain from active participation in politics, lest his loyalty to his party should bring him into conflict with his loyalty to his Minister.

The rules which govern the conduct of a civil servant do not often come before the courts, since in a matter which is at the discretion of the Crown the aggrieved civil servant has no legal remedy. They are to be found in Treasury Minutes or, in important matters like disqualification from parliamentary candidature, in Orders in Council. The contents of these rules closely resemble rules of law proper and are enforced as such by the heads of departments, but their character is largely determined by the need for securing continuity of administration and the exclusion of individual participation in political activity. The enforcement of such rules is not a matter for the courts.

Parliament.

The law and custom of Parliament may be said in some respects to occupy a position midway between law, in the narrower sense of rules applied by the courts, and convention. Some part of the law of Parliament is contained in statutes ; for example, the composition of the House of Commons is determined by the Representation of the People Acts ; the powers of the House of Lords to reject Bills passed by the Commons are limited by the Parliament Act, 1911. Another part is contained in decisions of the courts, such as the limits of parliamentary privilege when it comes into conflict with the legal rights of the subject.[1] Much else, including all matters relating exclusively to internal procedure and discipline of members, is determined by each House for itself. Under this heading comes the rule which excludes peers who have no judicial qualifications from sitting in the House of Lords to determine appeals from the courts. This is purely conventional. The Standing Orders of the House of Commons are determined by the House itself. In form they are not readily distinguishable from a code of law, but no judge is concerned with their enforcement. Standing Orders provide for the course of legislation, for rules of debate, for safeguarding the rights of the House, especially with regard to supplies (money) and taxation. They are not comprehensive ; other matters of ordering proceedings can only be ascertained

[1] Part III., Chap. 4, *post.*

by reference to precedents recorded in the Journals of the House. They embody much that is important to the constitutional lawyer, such as the principle that the expenditure of public funds can only be proposed by a Minister of the Crown, a provision which, as has happened in the Dominions, would be found in a written constitution.

Privilege and Prerogative.

If the narrow view of the distinction between law and convention be accepted, namely that law is limited to those rules which are applied by the courts, much of the law and custom of Parliament is properly included under conventions. But in so far as Parliament itself enforces this law and custom by requiring compliance with its procedural code and maintaining its privileges, the distinction is a thin one. Perhaps the answer is to be found in comparing the privileges of Parliament with the royal prerogative. There are many matters of prerogative, such as the conduct of foreign affairs, the dissolution of Parliament (otherwise than by efflux of time), the disposition of the Armed Forces, which cannot be challenged in the courts. So too with privilege, and generally with the unwritten law of Parliament, the evidence of what is part of the ancient law of Parliament is only to be found in declarations made by that body, and not in decisions of the courts. As will be seen later,[1] the subject of parliamentary privilege lies in a field where the relations between the House of Commons and the courts are not yet clearly determined.

Commonwealth Relations.

Lastly there is a fertile field for conventions in the rules and practices which influence and govern relations between the members of the British Commonwealth of Nations and between the Dominions and foreign States. There is still a prevalent but erroneous belief that the Statute of Westminster removed dominion status from the realm of convention to that of law. The Statute, however, conferred legal autonomy only in the exercise of the legislative function. Two well-established conventions are recited in the preamble to the Statute and section four, which prohibits the Parliament of the United Kingdom from legislating for a Dominion without request and consent, merely gives legal sanction to an existing convention. This again serves to emphasise how slender may be the distinction between convention and law.

It is in this field that conventions derive from express agreement, usually reached at the periodic meetings of Imperial Conferences. But it must be emphasised that such agreements have no sanction behind them, and indeed there have been occasions when no convention has resulted simply because one or other of the Governments represented at a conference has gone out of office before

[1] Part III., Chap. 4; and see especially May, *Parliamentary Practice*, 13th ed., pp. 72–73.

any step had been taken to implement the decisions reached which have not proved acceptable to its successor.

Why Conventions are observed.

Dicey concluded that the reason why conventions are observed was that a breach would ultimately bring the offender into conflict with the courts and the law of the land.[1] Other writers find the answer less easy and criticise Dicey's reasoning, even in its application to the limited field of conventions governing the use of the royal prerogative. Jennings in particular makes the point,[2] that the emphasis upon the courts is misplaced, because much modern law is created by statute and enforced by administrative authority. The same writer points out that the absence of a written constitution is responsible for the difficulty of dividing law and convention by a clear line which would separate rules within and without the constitution. With us all institutions of government have been established by custom or convention or by the authority of an institution so established, particularly by Parliament itself. He argues that, if this is so, the explanation that a breach of convention may result in a breach of the law is unacceptable.

Effective Sanction.

It was Dicey's argument that a breach of the law would usually follow from disregard of the usages by which ministerial responsibility to the House of Commons is maintained, but he was also mindful of political sanctions, as evidenced by his discussion of the so-called external limitations upon the sovereignty of Parliament. Breach of a convention in any case is far more likely to lead to political action than to proceedings in court being brought against the offender. The refusal of a defeated Ministry to resign, though ultimately it could lead to illegal administrative action which Parliament would refuse to sanction or condone, would have much more rapid repercussions in the political field. It may safely be said that the effective sanction against defaulting Ministers is to be found in votes of censure rather than prison bars.

Conclusion.

It is of more practical importance to consider the motive which induces obedience in each field where conventions operate. The King is guided in his exercise of his personal prerogatives by a recognition of the tradition of impartiality which has grown up round the throne and is the real safeguard to ensure a continuance of the monarchy. His Ministers fear lest they may be compelled to resign by force of public opinion manifested by an adverse vote at the polls, or, even apart from an election, by estranging some or all of their supporters in the House of Commons. They may also be credited with the desire to govern in accordance with the traditions of representative government. In the sphere of Commonwealth

[1] Dicey, *op. cit.*, pp. 445–46, Introduction, pp. cxxxvi *et seq.*
[2] See *The Law and the Constitution*, 3rd ed., Chap. III., sect. 2.

relations, the knowledge that there are in the background the vital political issues of unity in the Commonwealth and defence secures moderation in the use to which independence, now fully conceded by the United Kingdom, is put by each Dominion. There is in fact a standard of political authority which commands obedience. Those who govern submit to the judgment of public opinion, which they may seek to influence, but cannot ultimately control.

PART III.

PARLIAMENT.

Law and Custom of the Constitution, by Sir Wm. Anson: Vol. I., Parliament, 5th ed., by Sir M. L. Gwyer (Clarendon Press).

Parliament, by W. I. Jennings (Cambridge University Press).

The Finance of Government, by J. W. Hills and E. A. Fellowes, 2nd ed. (Philip Allan).

Parliamentary Practice, by Sir T. Erskine May, 13th ed. (Sweet & Maxwell). The standard work of reference.

CHAPTER 1.

THE COMPOSITION OF PARLIAMENT.

A.

The House of Lords.

PARLIAMENT consists of the King, the House of Lords and the House of Commons. The two Houses sit separately and are constituted on entirely different principles. They must, therefore, be considered separately. The process of legislation is, however, a matter for both Houses and it is important to appreciate at the outset that the two-chamber system is an integral part of the constitution, even since the Parliament Act, 1911, reduced the powers of the House of Lords. On the other hand, that House plays no part in making or unmaking Governments; for the control of the Executive is the function of the House of Commons. The Two Houses.

The House of Lords consists of (i) over seven hundred and sixty temporal, and (ii) twenty-six spiritual Lords of Parliament. The temporal peers are: The House of Lords.

(*a*) Hereditary peers of the United Kingdom;[1] who include holders of titles created in the peerage of England before 1707 and in the peerage of Great Britain from 1707 to 1801.

(*b*) Sixteen representative peers of Scotland elected from their own number for each Parliament by the hereditary peers of Scotland in accordance with the provisions of the Act of Union of 1707.

(*c*) Representative peers of Ireland elected for life. Until the

[1] Princes of the Blood Royal only sit in the House by virtue of hereditary peerages conferred upon them by the Sovereign, with the exception of the heir apparent, who sits as Duke of Cornwall.

creation of the Irish Free State in 1922 the peers of Ireland had under the Act of Union with Ireland, 1800, the right to elect twenty-eight representative members of the House of Lords, but there have been no elections since the foundation of the Free State, and with the abolition of the office of Lord Chancellor for Ireland the machinery for their election ceased to operate.[1]

(*d*) Seven Lords of Appeal in Ordinary appointed to perform the judicial duties of the House of Lords and holding their seats in the House for life.

The Hereditary Peers of England and the United Kingdom.

The English House of Lords before the Act of Union with Scotland consisted of all the hereditary peers of England and the Lords Spiritual. After the Act of Union there was created a peerage of Great Britain, and similarly after the Act of Union with Ireland, a peerage of the United Kingdom. A peer of the United Kingdom, as had a peer of England before 1707 and a peer of Great Britain between 1707 and 1801, has the right to sit in the House of Lords.

Creation of Peers.

Temporal peerages are created by the King on the advice of his Ministers. They are, except the judicial peerages, hereditary and, except in the case of Scottish and Irish peerages, carry with them the right to a seat in the House of Lords. A hereditary peerage can be created either by the issue of a writ of summons to the House of Lords, followed by the taking of his seat by the recipient of the writ, or by letters patent, the latter method being invariably adopted since very early times.[2] A peerage created by letters patent descends according to the limitation expressed in the letters patent, which is almost always to the heirs male of the body of the grantee, *i.e.* to and through the male line in direct lineal descent from the grantee. A peerage created by writ of summons descends to the heirs general of the grantee, *i.e.* to his heirs male or female, lineal or collateral. Thus in the absence of a special limitation in the letters patent, it is only a peerage created by writ of summons which ever devolves upon a female. Where there is only one female heir, she becomes a peeress in her own right. Where, however, there are two or more female descendants of equal degree, the elder is not preferred to the younger, and both or all inherit as co-parceners. In such cases a peerage falls into abeyance. Such an abeyance may on the advice of the Committee of Privileges of the House of Lords, which on reference from the Crown decides claims to existing peerages, be terminated by the Crown in favour of one co-heir, or in process of time may become vested in one descendant of the last holder of the peerage. The House of Lords has during the present century resolved to restrict drastically the practice of advising the termination of abeyances. A dispute as to the right of a newly-created peer

[1] In 1944 the number was eleven.
[2] See specimen Letters Patent in Appendix C.

to sit is determined by the House itself, acting through the Committee of Privileges.

Special Remainder

Where a grantee has no direct male heir of the body, the letters patent, in order to preserve a peerage from extinction, may limit the peerage to the daughter of the grantee and the heirs male of her body, in default of heirs male of the body of the grantee.

Restriction

A peerage cannot be alienated or surrendered, nor has a peerage any connection with the tenure of land. This last point was finally decided by the *Berkeley Peerage Case* (1861), 8 H.L.C. 21. A peerage cannot be created with a limitation of descent which is unknown to the law relating to real property; *Wiltes Peerage Case* (1869), 4 H.L. 126. It was decided in the *Wensleydale Peerage Case* (1856), 5 H.L.C. 958, that the Crown, although able to create a life peerage, cannot create such a peerage carrying with it any office of honour—a term which includes the right to a seat in the House of Lords. This case illustrates the importance of the distinction between a peerage and a lordship of Parliament. It was perhaps unfortunate that the decision shut the door on an attempt to strengthen the House of Lords without the need for legislation and without increasing the number of the hereditary peerage. The decision was given in spite of weighty arguments to the contrary. The view which prevailed was that, as the issue of a writ of summons followed by the taking of his seat by the recipient created a hereditary peerage, it was therefore impossible to allow one whose peerage was by letters patent limited to his life to take his seat.

Disqualifications.

An alien cannot receive a writ of summons to the House of Lords, nor may a writ of summons be issued to a bankrupt peer. Neither an infant nor a woman may sit in the House of Lords. It was decided in the case of *Viscountess Rhondda's Claim*, [1922] 2 A.C. 339, that the Sex Disqualification (Removal) Act, 1919, gave no right to a peeress in her own right to receive a writ of summons to Parliament. Felony followed by penal servitude or imprisonment with hard labour or for twelve months disqualifies from sitting or voting until after pardon or completion of the term of punishment. The House itself when sitting to try one of its own members [1] can impose any sentence of disqualification. A peer who is a civil servant is debarred by Treasury Minute from speaking or voting, though he may, of course, take his seat in the House.

Creation o Peers.

The right of the Crown to create new peers was an important weapon to enable the Crown on the advice of the Prime Minister of the day to compel the House of Lords to give way to the House of Commons in case of conflict. The Peerage Bill of 1719 attempted to limit the power of the Crown to create new peers, but the proposal was rejected. The passing of the Reform Bill in 1832 and the

[1] Part V., Chap. 1.

Parliament Bill in 1911 were procured by a statement that the King had consented to create peers in sufficient numbers to secure a majority for the Government in the House of Lords.[1] It may be that this prerogative will again be invoked; but the passing of the Parliament Act, 1911, was thought at the time to reduce the likelihood of this.[2]

The Peers of Scotland.

No new Scottish peerages can be created since the Act of Union of 1707. When a new Parliament is summoned, the Scottish peers elect sixteen of their number to represent them in the House of Lords. Scottish peerages in respect of which no vote has been given since 1800 have been struck off the electoral roll. It was at one time thought that the Crown could not confer upon a peer of Scotland a peerage of the United Kingdom entitling him to a hereditary seat in the House of Lords, but this view was rejected by the judges in 1782 in advising the House upon the claim of the Duke of Hamilton and Brandon.

The Peers of Ireland.

The Act of Union with Ireland, 1800, provided that the Irish peerage might be maintained to the number of a hundred. During the Union there were twenty-eight representative life peers of Ireland, and elections took place as and when vacancies occurred.

The Lords of Appeal in Ordinary.

The Lords of Appeal in Ordinary are the seven judicial peers appointed by virtue of the provisions of the Appellate Jurisdiction Acts, 1876–1929, to perform the judicial functions of the House of Lords. They have the right to sit and vote for life, notwithstanding resignation from their judicial appointment. They are entitled to a salary of £6,000 per annum, and must have held for two years high judicial office,[3] or have practised at the Bar for fifteen years.

The Lords Spiritual.

The Lords Spiritual are twenty-six bishops of the Church of England holding their seats in the House of Lords until they resign from their episcopal office. The Archbishops of Canterbury and York and the Bishops of London, Durham and Winchester have the right to a seat in the House of Lords. The remaining twenty-one spiritual lords are the twenty-one other diocesan bishops having seniority of date of appointment. When a bishop dies or resigns, his place in the House of Lords is taken not by his successor, but by the next senior diocesan bishop.

The Summoning of Peers.

A summons to Parliament cannot be withheld from a peer who is entitled to it, and individual writs of summons are drawn up for both the temporal and spiritual lords of Parliament. Although peerages are now invariably created by letters patent, a writ of summons must be received for each Parliament before a peer is entitled to take his seat. The writ addressed to a bishop contains

[1] Anson, *op. cit.*, Vol. I., p. 300.
[2] P. 96, *post.*
[3] Part V., Chap. 1.

the praemunientes clause which instructs the bishop to warn the clergy of his diocese to be present and consent to whatever Parliament ordains. This clause is a reminder of the time when the clergy attended Parliament as a separate estate. The clergy always attended reluctantly and preferred to grant taxes in Convocation. Since the fourteenth century they have not, except for the spiritual peers, attended Parliament, and since the seventeenth century they have ceased to tax themselves. Writs of attendance are also issued to the High Court Judges and the Attorney-General and the Solicitor-General. It is in fulfilment of this summons that the Judges have, in the past, performed the duty of advising the House of Lords on points of law in particularly difficult cases.

B.

The House of Commons.

The Constituencies.

The House of Commons consists at the present time of 640 members representing constituencies in England, Scotland, Wales and Northern Ireland. All these constituencies except the Universities are territorial. Eighteen constituencies return two members each and one (the Scottish Universities) returns three members. The remainder are single-member constituencies. By the House of Commons (Redistribution of Seats) Act, 1944, there were established four permanent boundary commissions, for England, Scotland, Wales and Northern Ireland. The Speaker is the chairman of each of the four commissions. The Act provided for (1) the immediate division of single-member constituencies with an existing electorate of over 100,000 which increased the membership of the House, then 615, by 25 [1]; (2) an initial general review by each of the commissions of the representation of the whole of that part of the United Kingdom with which they are concerned; and (3) a periodical review of constituencies by the commissions at intervals of not less than three nor more than seven years with a view to recommending redistribution in accordance with changes in the number of electors. Effect will be given by Act of Parliament to the initial general redistribution of seats recommended, but thereafter redistribution will be effected by Orders in Council requiring an affirmative resolution of each House of Parliament for their approval. It is laid down that, until Parliament shall otherwise determine, the number of constituencies in England, Wales and Scotland together shall not after the initial redistribution, which must be initiated not later than October 1947, be substantially greater or less than 591, the number of constituencies in Scotland shall be not less than 71,

[1] S.R. & O., 1945, No. 701. All the new constituencies are in England.

in Wales not less than 35, in Northern Ireland 12. It follows that the number of English constituencies must be reduced from the present figure of 510, since it cannot as a permanent measure exceed substantially the number of 485.

Single-Member Constituencies.

It is contemplated that, unless there are particular circumstances rendering division undesirable, all two-member constituencies (other than Universities and the City of London) will be divided into single-member constituencies at the first redistribution. The Act will result in the periodic division of abnormally large constituencies and the periodic increase in size of abnormally small constituencies. So far as is practicable the electorate of a single-member constituency will not exceed the electoral quota by more than approximately a quarter of the quota. The electoral quota means the number obtained by dividing the total electorate by the number of constituencies.

History of the Franchise (England and Wales)—the County Franchise.

Since 1929 every adult person has, apart from certain disqualifications, possessed the franchise, or the right to vote. Before 1832 the franchise in county constituencies was exercised only by those males possessing freehold property worth 40*s.* a year. By the famous Reform (Representation of the People) Act, 1832, the county franchise was extended to long leaseholders and copyholders of property of the annual value of £10, and to all male leaseholders for terms of not less than twenty years and to occupiers of property of £50 annual value. The county representation was increased from 82 to 139 seats. Various further changes were made in the county franchise by the Representation of the People Act, 1867, and the Representation of the People Act, 1884, enfranchised all male householders and lodgers occupying rooms of the annual value of £10 unfurnished. The latter Act enfranchised many agricultural labourers.

The Borough Franchise.

The borough franchise before 1832 varied from borough to borough.[1] The most common qualifications were: tenure of land, membership of a corporate body, tenure of particular tenements, and in certain cases merely residence. The Act of 1832, in addition to disfranchising many boroughs and transferring the seats to counties and large towns, established for the boroughs a uniform occupation franchise for any male who occupied as owner or tenant any house, shop or other building of the annual value of £10. The Act of 1867, which enfranchised the artisan class, extended the franchise to any male householder occupying a separate dwelling-house, and to lodgers occupying lodgings of the annual value, unfurnished, of £10. The borough franchise was substantially unaffected by the Act of 1884. This Act was followed by a further redistribution of seats, based on the general principle of equal electoral districts, each returning a single member.

[1] See Ilbert, *Parliament*, Chap. II. (Home University Library)

Representation of the People Act, 1918.

The Representation of the People Act, 1918, established a uniform franchise for county and borough constituencies. This Act also redistributed seats, increasing the total membership of the House, which was 658 in 1832 and 670 in 1885, to 707. The creation of the Irish Free State in 1922 reduced the membership to 615. The franchise was given to all adult males possessing the qualifications either of residence or of the occupation of business premises. The franchise was also given to women of thirty years of age who, or whose husbands, occupied, in accordance with the requirements as to occupation for local government franchise, land or premises of the annual value of not less than £5 or a dwelling-house. In the university constituencies [1] all male graduates were entitled to vote, and all women of the age of thirty who were either graduates, or would have been graduates, if their university had admitted women to degrees. Disqualification by reason of receipt of outdoor poor relief was abolished by the Act of 1918 for both the parliamentary and local government franchise.

The Modern Franchise.

A uniform qualification for men and women was introduced by the Representation of the People Act, 1928. The effect of this Act, which amended the Representation of the People Act, 1918, was that the franchise could be exercised by all adults possessing one or more of the following qualifications:

(*a*) Residence for a qualifying period of three months ending on June 1.
(*b*) Occupation of land or premises for business purposes of the annual value of £10 for the same period.
(*c*) Being the husband or wife of an occupier of such land or premises.
(*d*) Graduate membership of a university in the United Kingdom.

In December 1944, there came into operation a system of registration which involved a departure from the normal qualification based on a period of residence. The wholly abnormal movement of population into the forces and other forms of national service necessitated the introduction, as a war-time experiment, of a qualification based either on the address of the elector recorded on his identity card or on his membership of the armed forces raised 'in' the United Kingdom.[2] The qualifications based on the occupation of business premises and graduate membership of a university required little alteration, except to secure facilities for service electors to exercise the franchise and to remove the qualifying period of occupation of business premises. New arrangements were

[1] The Universities of Oxford and Cambridge have returned burgesses to Parliament since the time of James I. All the universities in the United Kingdom are now represented in the House of Commons.

[2] Or membership of the merchant navy or civilian war-workers abroad.

accordingly made for proxy and postal voting by members of the forces in respect of these qualifications as well as the service qualification. These changes were enacted by the Parliamentary Electors (War-time Registration) Acts, 1943 and 1944, which suspended so much of the Representation of the People Acts, 1918–28, as relate to qualification and registration of electors.

Further changes were made by the Representation of the People Act, 1945, following on the recommendations of the Speaker's Conference which reported in the summer of 1944. The qualification of the spouse to be registered as a business premises voter was abolished. The class of service electors was enlarged to include members of the Indian, Colonial and Burma forces who but for their war service would be resident in the United Kingdom. The qualification for the parliamentary franchise automatically carried qualification for the local government franchise, which had hitherto been restricted to occupiers of land and premises. This Act also contained novel provisions to enable the greater part of the armed forces stationed in theatres of war and elsewhere abroad to vote by post at a general election. Only those in the most distant or isolated stations were restricted to voting by proxy.

Thus the exercise of the parliamentary franchise to-day depends upon registration as an elector based upon one or more of the following qualifications:

(i) Registration in the National Register as a civilian resident at the address contained on the elector's identity card on the relevant date [1] for compiling the register of electors,

or

Registration as a service elector, including members of the forces and of the merchant navy and civilian war-workers abroad.

(ii) Occupation of land or premises for business purposes on the relevant date for compiling the register.

(iii) Graduate membership of a university.

An elector may not at a general election vote in more than two constituencies, one of them must be in virtue of the residential qualification. Nor may an elector vote in the same constituency in respect of two qualifications.

The Register of Electors.

It is a condition precedent to exercising the vote that the elector should be placed upon the register of electors. Prior to the Second World War the register was prepared once a year by the registration officer of each parliamentary borough and county. To be registered in respect of either the residence or occupation of business premises qualification under the Representation of the People Acts, 1918–28,

[1] July 31, but June 30, if the Act of 1944 (*ante*) is renewed by resolution of Parliament.

the elector had to reside or to occupy business premises in the constituency, or in another constituency in the same parliamentary borough or county, or in any adjoining parliamentary borough or county, for a period of three months ending on June 1 before the annual preparation of the register which came into force on October 15. The legislation of 1943–45 outlined in the preceding paragraphs inevitably involved considerable changes from this system. Briefly, in consequence of the assimilation of the parliamentary and local government franchise, there was provided an annual register published on October 15 to serve for twelve months for local elections, but only for the latter part of each year for parliamentary elections. For such an election (whether a general or by-election) held before October 15 a register has to be compiled specially for that election. For the year 1945 only an additional register was published on May 7 to serve for parliamentary elections held prior to October 15. The register is prepared by the registration officer who is in the case of a parliamentary county the clerk of the county council and in the case of a parliamentary borough the town clerk.

Any person may claim to be placed upon the register, and anyone may object to such claims. An appeal lies from the decision of a registration officer to the County Court, and on a point of law from the County Court to the Court of Appeal. Once placed upon the register, any person not suffering from any legal incapacity imposed by common law or statute, such as infancy or insanity, is entitled to vote, even though not qualified for inclusion on the register by reason of residence, occupation or membership of the forces. The refusal by a returning officer at an election to accept the vote of any person of capacity upon the register is an infringement of a legal right, and renders the returning officer liable to an action for damages if he has acted maliciously: *Tozer* v. *Child* (1857), 7 E. & B. 377; *Ashby* v. *White* (1704), 2 Lord Raymond 938; K. & L. 72.[1]

Disqualifications for the Franchise.

The following are the various disqualifications for the franchise. The franchise may not be exercised by:

(*a*) Infants.

(*b*) Peers.[2]

(*c*) Returning officers,[3] *i.e.* sheriffs of counties, and mayors of parliamentary boroughs.

(*d*) Aliens, viz. persons who are not British subjects.

(*e*) Lunatics and idiots.

[1] For error in performance of a purely ministerial duty an action will lie without proof of malice: *Pickering* v. *James* (1873), L.R. 8 C.P. 489.

[2] An Irish peer, other than one who before 1922 had been elected as a representative peer (see pp. 69–70 and 72, *ante*), can exercise the franchise if he is a member of the House of Commons.

[3] A returning officer, if registered as an elector, may give a casting vote in the event of a tie.

(*f*) Persons convicted of treason or felony who have not completed their punishment or been pardoned provided that they were sentenced to penal servitude or imprisonment with hard labour or for more than twelve months.

(*g*) Persons convicted of offences under the Corrupt and Illegal Practices Prevention Act, 1883, suffer a temporary disqualification which is universal in its incidence in the case of a corrupt practice[1]; local in the case of an illegal practice.[1]

Disqualifications for Membership.

The following are disqualified from sitting and voting as members of the House of Commons:

(*a*) Aliens.

(*b*) Infants.

(*c*) Lunatics and Idiots. By the provisions of the Lunacy (Vacating of Seats) Act, 1886, the committal or reception of a member must be reported to the Speaker. The Speaker obtains a report from the Lunacy Commissioners, followed by another report after an interval of six months, and, if the member is still of unsound mind, his seat is vacated.[2]

(*d*) Peers, but peers of Ireland who had not been elected before the creation of the Irish Free State as representative peers in the House of Lords are eligible for membership except for Northern Ireland constituencies.

(*e*) Clergy of the Church of England, the Church of Scotland and the Roman Catholic Church.

(*f*) Persons holding pensions at the pleasure of the Crown, other than holders of civil, military and diplomatic service pensions.

(*g*) Bankrupts.[3]

(*h*) Persons guilty of corrupt practices, as provided by the Corrupt and Illegal Practices Prevention Act, 1883.

(*i*) Persons convicted of treason or felony who have not completed their term of punishment or been pardoned, provided that they were sentenced to penal servitude or imprisonment with hard labour or for more than twelve months. A member convicted of a misdemeanour may be expelled by the House of Commons, but such expulsion does not amount to a disqualification.[4]

(*j*) Persons holding or undertaking certain contracts or commissions for, or on account of, the public service. Any person so disqualified is subject to a penalty of £500 for every day on which he sits or votes. The penalty is payable to a common informer, not to the Crown. In the case of *Sir Stuart Samuel*, [1913] A.C. 514,

[1] P. 326, *post*.

[2] For other methods see Anson, *op. cit.*, Vol. I., pp. 81–82.

[3] The disqualification lasts until five years after discharge, unless the discharge is accompanied by a certificate that the bankruptcy was not caused by the bankrupt's misconduct.

[4] P. 113, *post*.

it was held by the Judicial Committee of the Privy Council, to which the question was referred, that this disqualification applied to a member of a firm employed by the Secretary of State for India in Council to purchase silver for the purpose of the Indian currency. An Act of Indemnity may be passed to relieve a member from the penal consequences of sitting and voting during the existence of such a disqualification. By the House of Commons Disqualification (Declaration of Law) Act, 1931, it was declared that this disqualification, which was imposed by the House of Commons (Disqualification) Acts, 1782 and 1801, extends only to contracts for the furnishing or providing of money to be remitted abroad or wares and merchandise to be used or employed in the service of the public.

(*k*) The holding of certain offices under the Crown: Office-holders.

This disqualification requires more detailed discussion in view of the "archaic, confused and unsatisfactory condition of the law."[1] During the first half of the seventeenth century the House of Commons asserted and secured the recognition of its right to control its own composition. The principle underlying the decisions made by the House was that a position, the duties of which entail prolonged absence abroad, or even at home, are incompatible with the duties of a member. Many of the decisions of this period were confirmed by subsequent statutes. Disputes as to qualification for membership are determined by the House of Commons itself.[2] Formerly it was necessary that the member chosen should himself be one of the body of electors represented. The law, however, was constantly disregarded and in 1774 was repealed. Property qualification for membership was abolished in 1858.

After the Restoration the House was concerned more with its relations with the Crown than with the desire to ensure that its members performed their duties. Moreover, whereas the earlier decisions of the House purported to declare existing law, it was now seeking to make new law and recognised the necessity of legislation. Fear of undue royal influence through the presence in the House of Commons of office-holders led to a series of Place Bills and in 1701, by a provision in the Act of Settlement there was enacted the complete exclusion of office-holders to take effect after the accession of the House of Hanover. This provision, which would have prevented the development of the Cabinet system, as we understand it, by excluding Ministers from sitting in the House of Commons, was repealed before it took effect. The Succession to the Crown Act, 1707, which is the basis of the present law on the disqualification of Succession to the Crown Act, 1707.

[1] *Report from the Select Committee on Offices or Places of Profit under the Crown*, H.C. 120 of 1941.

[2] P. 113, *post*.

office-holders, was designed to enable Ministers to keep their seats in the House of Commons and yet to exclude the bulk of office-holders. The Act disqualified from election persons accepting a "new" office created since 1705. The acceptance of an "old" office, *i.e.* pre-1705 office, though annulling the election of the person accepting it, left him eligible for re-election, unless disqualification was expressly attached by statute to the particular office.

Political and Non-Political Offices.

A considerable volume of legislation was required in order to convert the distinction between "old" and "new" offices into a distinction between political offices, the holders of which should be eligible for membership, and non-political offices, the holders of which should be excluded. A series of statutes disqualified or suppressed a great many old offices.[1] Another series provided for the eligibility of the ministerial heads of newly-created departments subject to the necessity of re-election. The necessity for re-election was abolished first in the case of particular offices and finally in the case of all offices of which the holders were eligible for membership.[2] Finally the number of ministerial office-holders who may sit in the House of Commons is limited by statute. In the result there has been secured a politically neutral permanent civil service and the presence in the House of Commons of sufficient Ministers to ensure co-operation between Parliament and the Executive.

Particular Disqualifications.

It is not proposed to summarise all the statutes which disqualify the holders of particular offices. Judges of the High Court of Justice and of the Court of Appeal are excluded by the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, which embodies the effect of a long-standing disqualification. By Order in Council (Servants of the Crown (Parliamentary Candidature) Order, 1927), any civil servant seeking election to the House of Commons must resign office on announcing his candidature. This Order applies also to officers and men of the regular forces so long as they remain on the active list. It does not, however, apply to officers on the retired or emergency lists of the Navy, Marines or Air Force or to officers or men of any of the auxiliary (e.g., Territorial Army) or reserve forces (including officers on any reserve of officers) except when embodied or called out on active service.[3] The Select Committee set up in 1941[4] recommended that the disqualification of those on the active list in the forces and of civil servants should be made statutory. A returning officer[5] is

[1] See Anson, *op. cit.*, Vol. I., p. 101.

[2] Re-election of Ministers Acts, 1919 and 1926.

[3] The House of Commons (Service in His Majesty's Forces) Act, 1939, a temporary measure to enable members to serve during the Second World War, enacted that no one should be incapable of sitting or voting in the House of Commons by reason only of membership of any of His Majesty's Forces.

[4] P. 79, note 1, *ante*.

[5] P. 77, *ante*.

excluded from candidature for the constituency in which he is the returning officer, unless he has delegated the whole of his duties to an acting returning officer. A temporary measure, the House of Commons Disqualification (Temporary Provisions) Act, 1941, which was renewed annually until 1944, exempted from disqualification any member of the House of Commons whose appointment to an office under the Crown was certified by the First Lord of the Treasury to be required in the public interest for purposes connected with the prosecution of any war in which His Majesty might be engaged.[1]

Limitation on number of Ministers in House of Commons.

The law in regard to the number of Ministers who may sit in the House of Commons is now based on the Ministers of the Crown Act, 1937 and later Acts creating new Ministries. No person is disqualified from sitting in the House of Commons by holding the office of Chancellor of the Exchequer, Secretary of State, First Lord of the Admiralty, President of the Board of Trade, Minister of Agriculture and Fisheries, Minister of Education, Minister of Health, Minister of Labour, Minister of Transport, Minister for the Co-ordination of Defence [2] or Minister of Supply; [3] but not more than sixteen holders of these offices may sit in the House of Commons at any one time.

Similarly no disqualification attaches to the Lord President of the Council, the Lord Privy Seal, the Postmaster-General or the Minister of Works; [4] but only three of the holders of these posts may sit and vote in the House of Commons at any one time. It follows indirectly that if all the above offices are filled, there must be at least three holders of them in the House of Lords. The First Lord of the Treasury, the Minister of Town and Country Planning [5] the Minister of National Insurance,[6] the Minister of Fuel and Power,[7] the Minister of Civil Aviation [8] and the Minister of Pensions are all eligible to sit in the House of Commons. A Minister who is appointed to perform particular duties without being put in charge of a department may sit in the House of Commons, but not more than three such Ministers may sit and vote at the same time.[9] The number of persons entitled to sit and vote in the House of Commons while

[1] The number exempted might not exceed twenty-five unless, as the result of an address from the House of Commons, an Order in Council so provides: Ministers of the Crown and House of Commons Disqualification Act, 1942.

[2] The post lapsed in 1940, when Mr. Churchill became both Prime Minister and Minister of Defence.

[3] Ministry of Supply Act, 1939.

[4] Minister of Works and Planning Act, 1942.

[5] Minister of Town and Country Planning Act, 1943.

[6] Ministry of National Insurance Act, 1944.

[7] Ministry of Fuel and Power Act, 1945.

[8] Ministry of Civil Aviation Act, 1945.

[9] Re-election of Ministers Act, 1919, s. 2, and House of Commons (Declaration of Law) Act, 1935.

they are Parliamentary Under-Secretaries must not exceed twenty-four.[1]

Penalties.

Where any of the permitted numbers is exceeded, an election is not invalid but only a Minister who held his office and was a member of the House of Commons before the excess occurred may sit or vote until the number is reduced by death, resignation or otherwise to the number entitled to sit and vote. A Minister who sits or votes when he is not so entitled is liable to a penalty not exceeding £500 for each day on which he so sits or votes.

The Ministers of the Crown (Emergency Appointments) Act, 1939,[2] rendered eligible for membership of the House of Commons any person appointed as a Minister of the Crown for the purpose of exercising functions in connection with the prosecution of any war in which His Majesty might be engaged. The Act also rendered eligible their Parliamentary Under-Secretaries with limitation as to numbers.[3]

Recommendation of Select Committee.

Apart from war-time offices the number of ministerial office-holders is about seventy. It is desirable that most, in fact all, the principal departments should be represented in the House of Commons. The Select Committee appointed in 1941 [4] recommended that not more than sixty holders of ministerial offices should sit and vote in the House of Commons at the same time. They further recommended that not more than one Parliamentary Private Secretary should be appointed for any one government department. The present practice is that each Minister and Parliamentary Secretary appoints his own Parliamentary Private Secretary (unpaid) from among members of his party in the House. Dr. C. K. Allen [5] commented of the House of Commons in 1944 that " at least one third of the present House of Commons consists of Ministers and sub-ministers or persons bound in one way or another to the policies and measures of different departments of Government, and thereby —most significant still—to the policies and measures of all the departments of the Government in which they serve."

Resignation.

From early times a member of the House of Commons has by strict

[1] This number excludes the Parliamentary Under-Secretaries to the Ministries created during the Second World War other than those Ministries made permanent by special Acts, *viz.* National Insurance, Fuel and Power, Civil Aviation, and Town and Country Planning. The number of Parliamentary Under-Secretaries to Ministries specified in the Ministers of the Crown Act, 1937, must not exceed twenty; see Ministry of Fuel and Power Act, 1945, 2nd schedule; but that number is temporarily increased to twenty-six by Defence (Parliamentary Under-Secretaries) Regulations, 1940, subsequently amended. See S. R. & O., 1942, No. 1131.

[2] Passed in permanent form, but rendered temporary by Ministers of the Crown and House of Commons Disqualification Act, 1942

[3] Subsequently varied by S.R. & O., 1942, No. 1131.

[4] P. 79, note 1, *ante*.

[5] *Law and Order* (Stevens), p. 282.

law been unable to resign his seat, and the acceptance of an office of profit under the Crown is still the only legal method of release from membership. The offices commonly used for this purpose are the Stewardship of the Chiltern Hundreds and the Stewardship of the Manor of Northstead, and these are since 1926 the only "old offices" under the Succession to the Crown Act, 1707, which still involve resignation.

Voting Methods.

In the single-member constituencies each elector can vote for only one candidate. When, as at the present day, there are more than two political parties seeking the votes of the electorate, this system of election makes little provision for the representation of minorities, and can lead to strangely anomalous results. It is mathematically possible for one party to obtain the largest aggregate of votes in the country and yet not win a single seat in the House of Commons. In 1922 the Conservative Party polled 38 per cent. of the votes cast in the election and obtained 347 seats in Parliament. In 1929 the Conservative Party again polled 38 per cent. of the votes cast, but obtained only 253 seats.

Alternative Vote.

Various systems of voting have been suggested with a view to securing a better representation of minorities and a distribution of seats corresponding more nearly to opinion in the country. The most notable of these are the alternative vote and proportional representation. If the alternative vote were adopted, single-member constituencies would be retained, but the elector would be allowed to express his choice of candidates in order of preference. If no candidate obtained a clear majority, the lowest on the list would be eliminated, his votes being distributed according to the second preferences shown on the voting papers. While making it more probable that in each particular constituency the final choice would be the real choice of the electors, the alternative vote would not provide adequately for the representation of minorities in the country.

Proportional Representation.

Under proportional representation, a form of which, known as the single transferable vote, is used in the university constituencies returning more than one member, the country would be divided into large constituencies, each returning several members. The elector would vote for the candidates in order of preference, and any candidate obtaining a certain quota of first preferences would be immediately elected. His surplus votes would be distributed to other candidates according to the second preferences expressed, and again any candidate then obtaining the quota would be returned and a similar distribution of his surplus would take place. This system would undoubtedly provide adequate representation of

minorities, but the drawback to any such system is that the more variety of opinion is represented, the more difficult it becomes to secure a Government of any one party with a reasonable working majority in the House of Commons. The Speaker's Conference on Electoral Reform and Redistribution of Seats rejected by large majorities proposals for proportional representation and for the alternative vote.[1]

[1] 1944, Cmd. 6534.

CHAPTER 2.

THE MEETING OF PARLIAMENT.

The Crown and Parliament.

PARLIAMENT is summoned by the King by royal proclamation,[1] and it is by the King that it is prorogued and dissolved. The modern practice is that the same proclamation both dissolves Parliament and summons a new one. The old Parliament is first prorogued and the dissolution immediately follows. The new Parliament can be summoned to meet not less than twenty clear days after the date of the proclamation.[2] Parliament cannot meet without a summons from the Crown. There is no express rule of law requiring an annual meeting of Parliament, though the Triennial Act, 1694, requires Parliament to meet every three years. But in practice legislation relating to the essential business of governing the country, including taxation and the expenditure of public funds, is only passed for one year and must be renewed annually, thereby ensuring that there is a session of Parliament at least once a year. For some years past it has been the practice for the parliamentary session to be prorogued in the autumn after a short resumption of sittings following the summer recess. The new session is then after a short period of prorogation opened in November.

Elections to House of Commons.

After the summoning of Parliament by royal proclamation, individual writs are issued to the members of the House of Lords, and writs are issued to returning officers commanding them toc ause an election of members of the House of Commons to be held. The returning officer gives notice of the date and place of election, which is the same day for every county and borough constituency, namely, the eighth day after the proclamation summoning a new Parliament. On this day, which is known as nomination day, candidates must be nominated. Every candidate must be proposed and seconded by an elector, and eight other electors must sign his nomination paper. If there are more candidates than vacancies, a poll is ordered and is held nine days after nomination day.[3] Voting is by secret ballot, and each elector indicates his choice by placing a mark against the name of the candidate whom he favours. There are provisions

[1] See Form of Proclamation in Appendix C.

[2] The Representation of the People Act, 1918, s. 21. The Representation of the People Act, 1945, s. 28 (1) (b) temporarily extends the date for the meeting of a new Parliament from not less than twenty to not less than forty days from the date of the proclamation.

[3] So long as elections are held on the basis of members of the forces voting by post as well as by proxy, the count of votes starts on the twentieth day after the poll. There is a two days' count and the result is declared on the twenty-first day.

enabling members of the forces and the merchant navy and others to vote by post or by proxy. University electors, since their qualification depends on graduation, irrespective of present place of residence or occupation of premises, normally send voting papers by post to the returning officer; they may also vote by proxy if they are qualified as absent voters to do so.

By-elections.

When a vacancy occurs in the House of Commons during the course of a Parliament, the Speaker issues a warrant for the issue of a writ for the holding of a by-election. A motion for the issue of the writ is normally moved by the Chief Whip of the party which held the seat before the vacancy occurred.

Dissolution.

Parliament endures for five years, unless it is sooner dissolved by the King.[1] The King cannot exercise his prerogative of dissolution without the advice of his Ministers; he can only dismiss his Ministers, though dismissal would only be justified under modern conditions by wholly abnormal circumstances.[2] It has for some time been a convention of the constitution that the King will dissolve Parliament at the request of a Prime Minister. The right to request a dissolution is a powerful weapon in the hands of a Prime Minister, who may use it to threaten recalcitrant supporters with the expenses of an election, and to compel the House of Lords to give way to the House of Commons, unless they are prepared to face the unfavourable result of an appeal to the country. A Prime Minister, whose Government is defeated in the House of Commons on a major issue, is expected either to resign, or to request a dissolution. Whether the convention as to the right to a dissolution would survive the presence of three parties, each with a fair proportion of seats, it is difficult to determine. It may be that the King would refuse, should the occasion arise, to grant a dissolution at the request of a Prime Minister who had never had a clear majority in the House of Commons. If, for instance, a Labour Government without a clear majority took office with the support of the Liberals, and that support was withdrawn, it may be suggested that the King could ask the leader of either the Conservative Party or the Liberal Party to form a Government before granting a dissolution at the request of the Labour Prime Minister, though a dissolution was granted in such circumstances in 1924, and it is improbable that any other course would be taken in the future for fear of involving the King in political controversy.

Demise of the Crown.

Until 1867 the death of the King affected the duration of Parliament. Since the Representation of the People Act, 1867, the duration

[1] See *Cabinet Government*, by W. I. Jennings (Cambridge University Press), pp. 307 ff. For prolongation of the life of Parliament by legislation, see p. 35, *ante*.

[2] Part II., Chap. 4, *ante*.

of a Parliament has been independent of the life of the King. Similarly should Parliament be prorogued or adjourned at the time of the death of the King, it meets at once without summons. Should the King die after a dissolution, but before the day fixed for the meeting of the new Parliament, the old Parliament would assemble and sit for six months or until sooner dissolved.

Prorogation. Prorogation brings to an end, not the existence, but a session of Parliament. Prorogation is effected either by the King in person or by a Royal Commission, the latter being the normal method, and operates until a fixed date. Parliament may be recalled at any time by proclamation when it is prorogued.[1] Prorogation terminates all business, and any public Bills which have not passed through all the stages in both Houses lapse. In the case of private Bills a resolution may be passed before the end of a preceding session directing that a particular Bill be held over till the next session, but public Bills have not hitherto been carried over in this way.

Adjournment. An adjournment of Parliament is effected by either House of Parliament for such time as it pleases, but does not put an end to any uncompleted business. The King may call upon Parliament to meet before the conclusion of an adjournment intended to last for more than fourteen days. In practice arrangements are made for terminating the adjournment of either House at short notice, should the Lord Chancellor or the Speaker be satisfied that the public interest requires it.

Opening of Parliament. Parliament, after a dissolution or a prorogation, is opened either by the King himself or by Royal Commissioners. As soon as the Houses have assembled, the Commons are summoned to the House of Lords to hear the Speech from the Throne, and, at the opening of a new Parliament, are first bidden to choose a Speaker. After choosing the Speaker the House adjourns until the following day, when the election of the Speaker is announced to the Lord Chancellor in the House of Lords. When a new Parliament meets, the Lords take the oath of allegiance as soon as Parliament has been opened, and the Commons as soon as the Speaker has been approved by the King and has himself taken the oath.

The Speech from the Throne. The first business of a new session of Parliament is the debate on the Speech from the Throne. The Speech, for which the Cabinet is responsible, announces in outline the Government's plans for the principal business of the session. It is delivered in the House of Lords either by the King himself or, when Parliament is opened by Commission, by the Lord Chancellor. In each House an address is moved in answer to the Speech, and the debate on this address provides an opportunity for a general discussion of the political situation. Before the address is moved, the ancient right

[1] Parliament (Elections and Meeting) Act, 1943, s. 34.

of Parliament to deal with matters not brought before it by the Crown (the rule of redress of grievances before supply) is asserted by the formal first reading of an obsolete Bill; in the Lords usually a Bill for the better regulation of "Select Vestries"; in the Commons a Bill for the better preventing of "Clandestine Outlawries."

Lord Chancellor.

The Lord Chancellor presides over the House of Lords. This office may be, but in practice is not, held by a commoner, and the Woolsack on which the Lord Chancellor sits as Speaker of the House is technically outside the precincts of the House. In contrast with the impartial position occupied by the Speaker of the House of Commons, the Lord Chancellor is free to take part in the deliberations of the House of Lords. Indeed he may often be the principal spokesman for the Government, and then he vacates the Woolsack temporarily while speaking, his place being taken by a Deputy-Speaker.

The Speaker.

The chief officer of the House of Commons is the Speaker. It is through the Speaker that the House communicates with the Sovereign. He issues writs for the filling of vacancies. He has the important duty of determining whether a Bill is a money Bill within the meaning of the Parliament Act, 1911.[1] Except when the House is in committee he is its Chairman and is responsible for the orderly conduct of debates. The Speaker is appointed at the beginning of each Parliament. The party with a majority in the House selects a candidate for the Speakership. Such selection is usually made after consultation with the other parties, in order that the selection may be the unanimous choice of the House. It is customary for the previous holder of the office to be re-elected, if he is again willing to serve. The Speaker's seat was until recently[2] not contested at an election. The result of this convention coupled with the nature of the duties of the office is to deprive the Speaker's constituency of active representation in the House. If a Speaker dies in office, all business comes to an end until a successor is appointed.

Chairman of Ways and Means.

When the House of Commons is in committee, the chair is taken by the Chairman or Deputy-Chairman of Ways and Means or by one of a Chairmen's panel of not less than ten members nominated by the Speaker for the purpose of providing Chairmen of Standing Committees.[3] These officers preside over Committees of Supply and Ways and Means,[4] when a Bill is taken in committee by the whole House. The Chairman or Deputy-Chairman of Ways and Means presides over the House in the absence of the Speaker. Unlike membership of the Chairmen's panel, the Chairmanship and

[1] P. 96, *post.*
[2] It is doubtful whether this convention can still be regarded as in force.
[3] P. 99, *post.*
[4] P. 102, *post.*

Deputy-Chairmanship of Ways and Means are party appointments. New appointments are made with every change of Government. By custom the holders of these two offices do not take a very active part in debates, even in the House itself.

Permanent Officers of the House of Lords.

The chief permanent officer of the House of Lords is the Clerk of the Parliaments appointed by the Crown and removable only by the Crown on address from the House of Lords. The Gentleman Usher of the Black Rod enforces the orders of the House, and the Sergeant-at-Arms attends on the Lord Chancellor. Under the Clerk of the Parliaments are a Clerk Assistant and Reading Clerk appointed by the Lord Chancellor and removable only by an address from the House.

Permanent Officers of the House of Commons.

The Clerk of the House of Commons or Under-Clerk of the Parliaments is appointed by the Crown. Two Clerk Assistants are appointed by the Crown on the nomination of the Speaker and are removable only by an address from the House. The Sergeant-at-Arms appointed by the Crown is responsible for attending upon the Speaker and enforcing the orders of the House, including warrants issued by the Speaker for commitment for contempt or breach of privilege.

CHAPTER 3.

THE FUNCTIONS OF PARLIAMENT.

A.

Control of the Executive.

It has been shown in discussing the transition to Cabinet Government [1] that it is Parliament that makes and unmakes the Executive. In order to retain office and to secure the passage of legislation and the grant of supplies a Government must command support in the House of Commons, and the choice of a Prime Minister depends upon the ability to secure such support. Normally the Prime Minister is the leader of the party which has the largest number of supporters returned to the House of Commons, though sometimes two or more groups will combine to keep in office a Government either based on a coalition or of a party which could not alone command a majority. It is through their representatives in Parliament that the electorate controls the Executive. The growth of the party system and the increase in the size of constituencies and the number of the electorate has resulted in votes being cast more for a party and its leader than for local representatives on their own merits. An elector votes as much to choose a Prime Minister as to choose his local member.

Control by the Electorate.

It is chiefly since the Reform Act of 1832 that there has been any control of the Executive by the people, and the degree of that control as well as the method of its exercise are still matters of dispute and subject to changing conventions.[2] It has become the custom for a Ministry defeated in the House of Commons to appeal to the electorate rather than to resign at once, and it has also become an established convention that, should a Ministry decide to offer their resignations rather than to ask for a dissolution, its successors should take the earliest opportunity to appeal to the electorate. A defeat at a general election involves in normal circumstances immediate resignation. These conventions might, however, quickly become obsolete, should the two-party system give place to a combination of groups or even to three or four parties. With more than two main parties there is a real risk of frequent defeat in Parliament, and parties tend to come together and break away again. It would be impossible for government to be carried on, should every change

[1] Part II., Chap. 2, A.

[2] *The People and the Constitution*, by C. K. Emden (Clarendon Press, 1933).

of Ministry due to a re-shuffling of parties be followed by a general election. It has been pointed out that, though a group system gives more accurate representation of opinion, it lessens popular control.[1] Not only do Parliaments tend to last their full time, but it is impossible with more than two parties for the electorate to express its opinion upon a definite issue. The degree to which the electorate can determine policy depends upon the honesty and skill with which the parties frame the issues at a general election. Some elections seem merely to involve a choice between two possible Prime Ministers. Others involve a clear verdict for or against a proposed legislative change. There is a tendency to regard as a convention the rule that no radical change of policy should be undertaken without a mandate from the people. Whether the difficulty of framing particular issues at a general election will lead to the adoption of the referendum is a problem of the future, but hitherto the advocates of this device have received little support in this country. In this connection it should be remembered that it is not only at an election that opinion can be tested. It is more and more becoming the custom for a Government to sense the feeling of the House and of the public by publishing in advance of a Bill its proposals in the form of a statement of policy as a White Paper.

Just as the relations between the electorate and the Executive are vague, so are the relations between members and their constituencies. Members of Parliament represent the whole community and are not mere delegates. Neither legally nor morally has a constituency a right to recall its member, but a member who changes his party is in normal circumstances expected to offer his resignation.

Power of the Cabinet.

A further consequence of the party system is the voluntary submission of Parliament to the Cabinet. A Cabinet with a clear majority in the House of Commons can usually secure the passage of its legislation in substantially the form that it proposes, subject to the now restricted powers of the House of Lords to delay the passage of a measure. It can also take the whole of the available time for government business, to the exclusion of the private member. In former times Governments were frequently defeated in the House of Commons, and still more frequently were forced to withdraw measures by threats of revolt among their followers. To-day members are returned to Parliament with the assistance of their party; without this assistance they cannot hold their seats. It is only a large and powerful party that can afford the expense and provide the machinery necessary for reaching the present electorate. The threat of a dissolution involving the expense of an election, and still more the threat of the withdrawal of the support of the party organisation, will, except in rare cases, ensure the maintenance of

[1] C. K. Emden, *op. cit.*

the Government in office, until it seeks a dissolution at a time chosen by itself.

Parliamentary control.

Although the real power to promote legislation rests with the Cabinet and, as will be shown, it is difficult for Parliament to keep any real control over expenditure, it must not be assumed that Parliament has no control over Ministers. The defeat of the Government in the Commons in practice seldom occurs, even in the case of one which commands no stable majority. Moreover, it is only defeat on a major issue which constitutionally compels resignation. Parliament, however, is a deliberative as well as a legislative assembly. Debates of real value may take place during discussions on expenditure which, though failing to alter immediate programmes, may influence subsequent policy. Motions can be moved asking for papers or for the appointment of commissions or committees of enquiry.[1] The daily question hour, during which questions are addressed to Ministers, provides an opportunity for concentrating public attention on topics of current concern. Parliamentary questions are also of value in securing the redress of individual grievances. The use of question hour for this purpose is a real constitutional safeguard. Civil servants are aware that departmental action for which they are responsible to their Minister may result in a parliamentary question which may embarrass him in the House. Important debates arise on the Address in reply to the Speech from the Throne at the opening of a session; on the Budget speech of the Chancellor of the Exchequer; on a formal motion of censure and on other occasions apart from ordinary legislative business. Debates unconnected with the passage of legislation are particularly useful in the House of Lords for the discussion of imperial and foreign affairs. Forty members may at the end of question time move the adjournment of the House of Commons in order to discuss a definite matter accepted by the Speaker as of urgent importance. If so accepted, the motion is taken later the same day. The debates on the estimates, taken on Supply days, serve the purpose of providing occasions for general debates on administration and policy, although the scope of debate is limited by the rule that proposals for legislation may not be discussed. There is usually an interval of half an hour every day between the close of public business and the time fixed for the adjournment of the House. An adjournment motion is moved and the ensuing half-hour may be used for raising matters which cannot easily be dealt with by question and answer, though no division can be taken. Ministers inevitably pay attention to general feeling in Parliament as giving valuable indication of general feeling in the country. The real weakness of parliamentary control lies in the fact that there is

[1] See Ilbert, *op. cit.*, pp. 114–16.

no time or opportunity for supervision of the work of government departments. In short, control of administration does not really exist. As the parliamentary system works to-day, the House of Commons chooses a Government and trusts it in matters of policy. It has been suggested that the departments should have attached to them committees of Parliament chosen for their special knowledge of the work of a department or group of departments.[1] They would examine in detail departmental estimates, and to them would be committed all Bills brought forward by their respective departments. Without some such change of procedure, or some measure of devolution and the establishment of subordinate legislatures for, *e.g.* Scotland, Wales, the North of England, it is impossible to establish real parliamentary control. There is perhaps little likelihood of closer control of departmental administration. Public administration is a highly technical matter and the ordinary member of Parliament, even if he possesses the qualifications for the task, has not at his disposal all the information available to the departments or the means of collecting such information. He is more likely to accept the advice of the expert than to influence the latter's policy. Proposals for the establishment of greater parliamentary control by means of committees are resisted on the ground that they would interfere with ministerial responsibility and the right and duty of the Government to govern.

B.

Legislation.[2]

Private Members' Bills.

When we speak of parliamentary supremacy[3] we mean that Parliament has the right to legislate on every topic, and that no other body may legislate except with the authority of Parliament. We have seen[4] that there are many practical limitations to the legislative power of Parliament. The real power to legislate rests with the Cabinet, which is under the constant pressure of organised opinion of all kinds seeking redress or relief through legislation. A public Bill, *i.e.* a Bill of general application, as opposed to one affecting particular local or private interests, may be introduced by a private member, but has little chance of becoming law unless the Government will allot sufficient time to it later in the session, or adopt the measure as its own after the second reading. The Government can use its majority to secure the first place for government business. Private members, if they are successful in a

[1] Ramsay Muir, *How Britain is Governed* (Constable), pp. 231 *et seq.*; Jennings, *Parliamentary Reform* (Gollancz), Chap. IX.

[2] Appendix A contains specimens of legislative forms.

[3] Part II., Chap. 2, B.

[4] *Ibid.*

ballot, may move motions and introduce Bills on certain days,[1] unless, owing to pressure of business, private members' time is annexed by the Government. Certain Wednesdays are allotted for private members' motions. There is no difference in procedure in regard to introduction between a government Bill and a private member's Bill. Any public Bill [2] may be introduced without leave, in which case no discussion takes place until the second reading. The second and third readings of private members' Bills are taken on Fridays, and members ballot for the opportunity to move the second reading of their Bills. A Bill may also be introduced under the "Ten Minutes Rule." This method is usually employed when the object of introducing a private member's Bill is to secure publicity for the subject-matter rather than to secure the passage of the Bill. A motion for leave to bring in the Bill is set down for consideration immediately after question time. Short speeches are made by the mover and one opposer and then the question is put.

Delegated [3] Legislation.

The increasing complication of the business of governing the country has led to ever-growing readiness to delegate legislative powers, though it must always be remembered that these powers are conferred by Parliament, and can be annulled or restricted by Parliament. The power to legislate when delegated is normally confined to matters of detail bordering upon administration, though in sudden emergency power may be delegated to legislate on major matters. The latter is well illustrated by legislation of 1931 when there were enacted by Parliament during the administration of a National Government a number of statutes which delegated power to legislate on matters of principle, subject to a time limit as to the exercise of delegated powers. The Gold Standard (Amendment) Act empowered the Treasury to legislate for the control of the exchange. The National Economy Act empowered the King in Council to effect reductions, including salary cuts, in certain public services. The Foodstuffs (Prevention of Exploitation) Act authorised the Board of Trade, subject to an annulling resolution by either House of Parliament, to control the supply and price of certain foodstuffs, while two other measures which were designed to check abnormal importations of manufactured articles and horticultural products delegated to government departments the power to impose duties, subject to affirmative resolutions by the Commons.[4]

The Import Duties Act, 1932, a permanent statute, is a striking example of delegation in relation to taxation. This Act delegated to the Treasury the power to legislate on matters of taxation without

[1] For questions of procedure, see *An Introduction to the Procedure of the House of Commons*, by G. F. M. Campion (Philip Allan).
[2] P. 98, *post*. [3] Part VII., Chap. 5.
[4] The Abnormal Importations (Customs Duties) Act, 1931; Horticultural Products (Emergency Customs Duties) Act, 1931.

fixing any time limit for the exercise of the power. The Act established a general *ad valorem* duty on all goods imported into the United Kingdom apart from certain specified exempted articles. The Treasury, after receiving a recommendation from the Import Duties Advisory Committee, who were removable from office by the Treasury, but otherwise independent of parliamentary or executive control, might by order direct that goods should be added to or removed from [1] the list of exempted articles. Similarly the Treasury might, on the recommendation of the Committee, impose or remove by order additional duties on luxury articles or articles of a kind which are produced or likely to be produced in substantial quantities in the United Kingdom.[2] On the recommendation of the Board of Trade the Treasury might by order give preferences to goods from particular foreign countries. The Act arranged for preferential tariffs for goods imported from the Dominions and Colonies.[3] The Board of Trade might with the concurrence of the Treasury impose additional duties on goods from those foreign countries which discriminated against United Kingdom goods. All orders made under the Act had to be laid before the House of Commons. Orders imposing customs duties expired after twenty-eight days, unless approved by resolution of the House of Commons. Other orders ceased to have effect, if within twenty-eight days the House by resolution determined that they should be annulled.

The Royal Assent.

Parliament cannot legislate without the concurrence of all its parts, and therefore the assent of the King is required. The King not only summons Parliament and can dissolve Parliament, but must give his consent before any legislation can take effect. After a Bill has passed through all its stages in Parliament, it is sent to the King for the Royal Assent, which is given either by the King in person or by commission. In giving the royal assent ancient forms are used. A public Bill, unless dealing with finance, as also a private Bill other than one of a personal nature, is accepted by the words " Le Roy le veult." The formula for the veto was " Le Roy s'avisera." A Bill of a personal nature, *e.g.* a divorce Bill in former times, is assented to by the words " soit fait comme il est desiré." A financial Bill is assented to with the words " Le roy remercie ses bons sujets, accepte leur benevolence et ainsi le veult." The right of veto has not been exercised since the reign of Queen Anne. It may be said to have fallen into disuse as a consequence of ministerial responsibility. The veto could only be exercised on ministerial advice, and no Government would wish to veto Bills for which it was responsible

[1] Finance Act, 1932, s. 7.

[2] Since 1939 the requirement of previous recommendation by the Committee has been suspended for the duration of the war.

[3] See also Ottawa Agreements Act, 1932, giving effect to agreements reached at the Imperial Conference, 1932.

or one for the passage of which it had afforded facilities through Parliament. The previous consent of the Crown is necessary before legislation can be passed which affects any matter relating to the royal prerogative, *e.g.* to limit the power to create hereditary peerages.

The House of Lords.

Except as provided by the Parliament Act, 1911, all legislation needs the assent of both Houses of Parliament. A Bill, other than a Bill relating to the imposition or application of taxes, may be introduced in either House and must pass through all its stages in both Houses. Important Bills which do not raise acute political controversy are frequently introduced in the House of Lords. It had for long been part of the customary law of Parliament that the House of Lords might reject, but not amend a Bill which related to public finance (other than charges of local authorities). To amend such a Bill would be to trespass upon the exclusive right of the Commons to grant or refuse supplies to the Crown. Though constitutional convention demanded that, when the will of the people was clearly behind the Commons, the Lords must give way in the event of a deadlock between the two Houses, the right of the Lords to reject legislation proposed by the Commons was until 1911 undisputed. The rejection by the House of Lords of the annual Finance Bill in 1909 led to the passing of the Parliament Act, 1911. By the provisions of that Act legislation may in exceptional circumstances be effected by the King and Commons alone. A Bill may be presented for the royal assent without the concurrence of the Lords:

(1) If the Lords fail within one month to pass a Bill which, having passed the Commons, is sent up endorsed by the Speaker as a money Bill before the end of the session; or
(2) If the Lords refuse in three successive sessions to pass a public Bill, other than a Bill certified as a money Bill, and if two years have elapsed between the date when it was read a second time in the House of Commons in the first and the date when it was read a third time in that House in the last of those sessions.

A Bill to extend the duration of Parliament is exempted from the provisions of the Parliament Act, and in view of the increased power given to the House of Commons a provision was embodied in the Act limiting the duration of Parliament to five, instead of seven, years.[1]

A money Bill is a public Bill which in the opinion of the Speaker contains only provisions dealing with either the imposition, repeal, remission, alteration or regulation of taxation; the imposition of charges on the Consolidated Fund, or on money provided by Parliament for the payment of debt or other financial purposes or the variation or repeal of such charges; supply; the appropriation,

[1] For Acts prolonging Parliament, see p. 35, *ante*.

receipt, custody, issue or audit of public accounts, or the raising or guarantee or repayment of loans. Bills dealing with taxation, money or loans raised by local authorities or bodies for local purposes are not certifiable as money Bills. It is curious that the annual Finance Bill has not always been endorsed with the Speaker's certificate, nor are many Bills which are on their face within the definition.[1] The only Bills which have passed into law under the operation of the Parliament Act are the Welsh Church Act, 1914, and the Government of Ireland Act, 1914. The latter was repealed before coming into force; the former became law only with some modifications.

Proposals for Amendment.

The effect of the Parliament Act is to leave the House of Lords with a suspensory veto over non-financial Bills, but with no power to prevent legislation proposed by the House of Commons. There have been innumerable proposals both for the reform of the House of Lords and for the amendment of the Parliament Act. In particular it has been urged that the duty of certifying a Bill to be a money Bill should be transferred from the Speaker to an impartial committee, and that there should be excepted from the provisions of the Parliament Act a Bill to abolish or alter the constitution of the House of Lords. Those who believe in the necessity of a second chamber with power to revise and insist on its revisions, and with power to compel the democratically chosen first chamber to appeal to the electors who appointed it before introducing any drastic changes in the law, would welcome the repeal of the Parliament Act, but any such proposal would involve reform of the composition of the House of Lords.

House of Lords Reform.

It would be impossible as a matter of political expediency to give new powers or to restore its old powers to the House of Lords as at present constituted on the hereditary principle. Many proposals have been made for a reformed House of Lords, *e.g.* the nomination of life peers by the Crown on the advice of the Government of the day, elections by large constituencies, or combinations of these and other methods. It has been found impossible to secure agreement upon any proposal for House of Lords reform. Reform without any increase of powers would be useless. The House of Lords as at present constituted performs competently the task of revising legislation which is not regarded as sacrosanct by the Government and of debating matters of public importance. A reformed House of Lords, if based upon the elective principle, would inevitably come into conflict with the House of Commons, while, if based on any other principle, its composition would almost inevitably be predominantly conservative. It is noticeable that in those countries

[1] See Hills and Fellowes, *The Finance of Government* (Philip Allan), 2nd ed., Appendix I.

where a second chamber proves of most value the constitution is federal. The Lower House is elected on a population basis, while the Upper House normally represents the component parts of the federation and thus secures that the point of view of the component States is put forward.

Conflicts between Lords and Commons.

Since the Parliament Act, the knowledge that the House of Commons can usually enforce its will upon the House of Lords has rendered less important the methods for the solution of conflicts between the two Houses, though since 1911 the opportunities for a conflict between Lords and Commons have been few, as no Government unable to command the support of the Lords has held office for as long as three years. If the Lords accept without amendment a Bill sent up to them by the House of Commons, they announce to the Commons that they have agreed to the Bill. If they amend a Bill, they return it with a message that they agree to the Bill with amendments to which they desire the consent of the Commons. In the past if the Commons disagreed with the amendments made by the Lords, there were two methods for attempting to effect an agreement. A formal conference could be held, but this method may be regarded as obsolete.[1] Alternatively a Committee of the House which was disagreeing with amendments could send to the other House a statement of their reasons, together with the amended Bill. A settlement would probably be reached by informal conferences between the party leaders. It will be remembered that, apart altogether from the provisions of the Parliament Act, for the Lords to amend a financial provision would be a breach of the privileges of the Commons. This rule is sometimes waived owing to the fact that so many Bills containing financial provisions raise issues of general political, as much as financial, importance. If the Lords amend a financial provision (not being a money Bill certified under the Parliament Act), the question of privilege is raised when the Bill is returned to the House of Commons, but the House may waive privilege and consider the amendments made by the Lords on their merits.

Public Bills.

The process of legislation is complicated. A distinction must be drawn between public and private Bills. The object of a public Bill is to alter the general law. A private Bill is a Bill relating to some matter of individual, corporate or local interest.[2] A private Bill must not be confused with a public Bill introduced by a private member. It will be convenient to state in outline the process by which a public Bill becomes an Act of Parliament.[3] It is presented

[1] As to conferences, see Anson, *op. cit.*, Vol. I., p. 298.

[2] Private Bills are of two kinds, Local, *e.g.* those affecting a particular locality, and Private (in the strict sense), *e.g.* those affecting a particular body or individual.

[3] The procedure described is that of the House of Commons.

and receives a formal first reading. It is then printed. Then follows a second reading. The debate on the second reading is a debate on the general merits of the Bill. After receiving a second reading it is referred either to one of the five Standing Committees of between forty and sixty members appointed by the Committee of Selection, or in the case of more important measures to a Committee of the whole House, if the House so decides upon motion, or to a Select Committee. In committee members may move relevant amendments, and may speak any number of times in support of or in opposition to such amendments. When a Bill is committed to a Committee of the whole House, the Speaker leaves the Chair, and his place is taken by the Chairman of Committees—the Chairman of Ways and Means—or his Deputy. There are five Standing Committees. At the beginning of each session there is appointed a Committee of Selection of eleven members drawn from all the main parties. The Committee of Selection nominates the members of four of the Standing Committees. Parties are represented as nearly as possible in proportion to their representation in the House itself. For each of these Standing Committees there is a nucleus of from thirty to fifty members and from ten to thirty-five others may be added by the Selection Committee for the consideration of a particular Bill. The fifth Committee—that for Scottish Bills—consists of all the members for Scottish constituencies with not less than ten nor more than fifteen other members. After the Committee stage the Bill as amended is reported to the House and is again discussed. Further amendments and alterations may be made in the report stage, and, if necessary, the Bill may be recommitted to the Committee. Finally the Bill is submitted to a third reading. During the third reading debate only verbal alterations may be made.

King's recommendation and Financial Resolutions.

The recommendation of the Crown, which is a guarantee that the Government accepts responsibility for the charge, is required by Standing Orders dating from the early eighteenth century before the House of Commons will proceed upon any motion for a charge upon the public revenue. This rule is in the United Kingdom merely embodied in a Standing Order, but it is of fundamental importance and is expressly enacted in most Dominion constitutions and in the Government of India Act, 1935. National expenditure is the responsibility of the Government, which must provide means to meet expenditure which is approved. Moreover private members are by the existence of this rule saved from temptation to suggest expenditure for the benefit of their constituents or particular interests. A Bill of which the main object is the creation of a public charge can only be introduced in the House of Commons. Wherever a Bill (and most modern Bills include some incidental expenditure) authorises any expenditure, a financial resolution in Committee of

the whole House is necessary. This rule is a survival from the days when the Speaker was a royal nominee and the House desired to discuss expenditure under the chairmanship of a member chosen by themselves. There was formerly an important distinction of procedure between Bills primarily concerned with expenditure and those only incidentally involving expenditure. In the former case, but not in the latter, it was necessary that a financial resolution in Committee of the whole House should precede the introduction of the Bill. This distinction is now of little practical importance, as Bills primarily concerned with expenditure follow the same procedure as Bills incidentally involving expenditure, provided that they are presented, or brought in upon an Order of the House, by a Minister of the Crown.[1] In that event, or when expenditure is only subsidiary to the main object of a Bill, the financial resolutions in Committee of the whole House may follow the second reading of the Bill. The financial clauses are printed in italics, and after the second reading the necessary financial resolutions must be agreed to in Committee of the whole House before any clause authorising a charge can form part of the Bill. Written instructions were in 1938 given to all departments and to parliamentary counsel to draft financial resolutions in wide terms in order that discussion might not be unduly limited by being confined by the terms of the financial resolutions introduced by the Government. The House then goes into Committee on the Bill or sends it to a Standing Committee. When a Bill is introduced in the House of Lords, the financial clauses are printed, but are only moved in the Commons at a later stage. They are left out of the Bill to avoid questions of privilege, but are inserted in brackets to make the rest of the Bill intelligible.

Closure.

The complicated stages which a Bill must go through and the amount of time involved have led, with the increase of the amount of business to which Parliament must attend, and of the number of members who wish to speak, to the adoption of various methods of curtailing debates. The simplest method is that known as the " closure," first introduced to check obstruction by the Opposition. Any member may, either in the House or in Committee, move " that the question be now put." The chairman may refuse to put the motion on the ground that it is an infringement of the rights of the minority, but, if the motion is put and carried, it brings to an end the debate which is in progress. The motion " that the question be now put " is voted upon without debate. It can only be carried in the House itself if the number voting is not less than 100. Another method is known as the " kangaroo " closure. The Speaker has the power, when a Bill is being discussed on the report stage, to select

[1] Other than a Bill imposing taxation, which must be preceded by a financial resolution in Committee of Ways and Means ; see p. 105, *post*.

from among the various amendments proposed those which shall be discussed. The chairman of a Committee of the whole House may exercise similar power, as since 1934 may the Chairmen of Standing Committees. More drastic still is the "guillotine." By resolution of the House, various periods of time are allotted to each stage of a Bill. At the end of each period the portion of the Bill in question is voted upon without further discussion. The guillotine cannot be employed in Standing Committees where the Government Whip cannot effectively operate. An allocation of time by agreement was substituted for the guillotine to deal with the Government of India Bill in 1935, and may be followed in other cases.

Drafting of Bills.

Almost all important Bills are brought forward by the Government of the day and are the result either of decisions of policy taken in the Cabinet or of the recommendations of departments. They are drafted by parliamentary counsel on instructions framed by the departments. In spite of the efforts of parliamentary counsel modern legislation becomes increasingly obscure. The problems which the draftsman is called upon to solve by legislative formulae increase in complexity as Parliament tries more and more to regulate social and economic conditions. Moreover pressure on parliamentary time, and even more the desire not to renew debate in Parliament on a former controversial issue, result in legislation by reference to other statutes. Then too amendments may be hastily introduced at the last moment in order to facilitate the passage of a Bill. On the other hand, the production of numerous consolidation Acts is materially assisting to elucidate the Statute Book, *e.g.* Local Government Act, 1933, and Public Health Act, 1936.

Financial Procedure.[1]

Parliament, and more particularly the House of Commons, has two main functions in relation to public finance, the grant of supply and the raising of revenue.[1] No payment out of the Exchequer may be made without the authority of an Act of Parliament, and then only for the express purpose for which it has been appropriated by the statute. No taxation, charges or loans can be authorised except by or under the authority of an Act.

Supply.

In advance of the opening of the financial year on April 1 the requirements of the departments in the form of estimates of the expenditure required for the public services for the coming year are presented to Parliament and published about the end of February. Previous to presentation the estimates are revised by and agreed with the Treasury, whose function is to adjust the competing claims of the various services, so far as the expenditure is capable of adjustment. A great part, however, of the requirements of the civil departments is fixed by statutes which determine the scale of expenditure, except the expenses of actual administration. Thus the

[1] The reader should refer to J. W. Hills and E. A. Fellowes, *op. cit.*

Treasury cannot by revision of the estimates scale down the rate of insurance benefits, or of pensions, or the grants-in-aid of local authorities' services where the expenditure incurred, though voted annually, is determined by the scale enacted in the Act which created the charge. In the event of disagreement between the Treasury and a department the final arbiter is the Cabinet.

Resolutions approving the various votes into which the estimates are divided are passed by the House of Commons in Committee of Supply.[1] This Committee, like the Committee of Ways and Means, is a Committee of the whole House, sitting under the Chairman of Ways and Means, or his Deputy, in place of the Speaker. Each vote can be discussed separately and is separately passed. The number of days allotted for consideration of the annual estimates, including votes on account, is regulated by standing orders. For many years the number has been fixed at twenty, all of which must be taken before August 5. The Opposition choose which of the departmental estimates they desire to discuss.[2] Discussions on supply afford an opportunity for discussing the general policy of the Government. In modern form the ancient rule holds good that redress of grievances must come before supply. No subject may be discussed that would require legislation. On the last day but one of the days allotted for supply all outstanding votes are taken, and on the last day there is taken the report stage of all outstanding resolutions. The resolutions when agreed to are embodied in the annual Appropriation Act which authorises the issue from the Consolidated Fund of the grants appropriating the amounts required for the Supply services of the year.[3] The Act also limits the expenditure of each department to the sums set out in a schedule to the Act, thus ensuring not only that expenditure does not exceed the sum voted but that it is only incurred for authorised purposes.[4] Before the Appropriation Act can be passed there must also be voted in Committee of Ways and Means[5] and agreed to on report resolutions authorising the withdrawal of moneys from the Consolidated Fund.

[1] The whole House sitting in Committee and adopting the less formal procedure of committee.

[2] When the House first goes into Committee of Supply on the Army, Navy, Air Force and Civil estimates respectively, a general discussion on the proposed estimates may take place on the question "that the Speaker do now leave the Chair." The four days devoted to these debates are not included in the twenty allotted days. They afford occasions for discussing amendments dealing with particular aspects of the administration of the services concerned which are moved by private members who ballot for the opportunity.

[3] Part IV., Chap. 6, and specimen Vote of Supply scheduled to the Act in Appendix A, p. 422, *post*.

[4] For the functions of the Comptroller and Auditor-General and his reports to the Public Accounts Committee of the House of Commons, see Part IV., Chap. 6.

[5] The resolutions are treated as formal.

Votes on Account and Consolidated Fund Acts.

It has been said that no expenditure can be incurred without parliamentary authorisation, but the Appropriation Act is not passed until July or August. Each financial year is a water-tight compartment. It follows that money must be provided for the Government between April 1 and the passing of the annual Appropriation Act. There are submitted to the Committee of Supply early in March votes on account of the civil and revenue departments. Similarly two or three of the votes from the estimates of each of the service departments are passed. Unlike the civil departments, these departments may temporarily use for one purpose money voted for another. The Committee of Ways and Means votes out of the Consolidated Fund a sum equal to the vote on account and the votes passed for the defence services, and there is passed a Consolidated Fund Act [1] authorising the withdrawal from the Consolidated Fund of the necessary sum. The sum formally authorised by the Appropriation Act is the total of the expenditure voted for the year less the sum already authorised to be withdrawn by Consolidated Fund Acts.

Supplementary Estimates.

Where a department later considers that it will need to exceed its estimated expenditure, a supplementary estimate must be introduced in Committee of Supply. The resolutions of the Committee of Ways and Means authorising the withdrawal from the Consolidated Fund of the sums so voted are usually embodied in the Consolidated Fund Act which authorises the issue of the next year's vote on account, and the sum is appropriated to specific objects in the next year's Appropriation Act. Except when a supplementary estimate relates to a change of policy or a new service, the policy of the service concerned can only be debated in so far as it is brought into question by the excess. These debates have been criticised as time wasting; but the fact that a supplementary estimate must be justified in debate does operate as a check on the departments in framing their original estimates.

Votes of Credit.

In times of grave emergency there may be voted a lump sum not allocated to any particular object. Such votes are known as votes of credit. By this means the extra-ordinary expenditure in time of war is in the main voted. The method involves relaxation of the usual methods of Treasury control, and in consequence the estimates of the departments concerned with war expenditure are presented with a token figure inserted instead of the actual expenditure proposed.

Appropriations in Aid.

There must also be mentioned appropriations in aid, the estimates for which appear side by side with the estimates of expenditure, though only the net amount of the latter is voted. Appropriations in aid are sums received by departments and retained to meet

[1] It is sometimes necessary for more than one Consolidated Fund Act to be passed in anticipation of the annual Appropriation Act.

departmental expenditure. For example, the net vote on account of the Public Trustee is £10, a token figure for the purpose of preserving parliamentary control, the whole of his expenditure being met by appropriations in aid in the form of fees.[1]

Procedure in Committee of Supply.

The financial procedure of the House of Commons in relation to sanctioning expenditure is adequate for the purpose for which it came into being, namely to ensure that money should only be spent with the authority of Parliament and for the purposes authorised by Parliament, but it provides no opportunity for real control of expenditure. Discussions in Committee of Supply afford an opportunity for a general discussion on the work of a department, but not for a detailed examination of departmental expenditure. A member may move to reduce, though not to increase a vote, but such motions are invariably treated by the Government as votes of confidence and are invariably withdrawn or rejected. The accounts are not presented in a form which is easily understood by members, nor are they well adapted for the ascertainment of comparative costs.[2] The passing of outstanding votes on the last two days of Supply may involve the approval without discussion of large items of public expenditure. There was until the outbreak of the Second World War a Select Committee on Estimates drawn from all parties which could examine estimates already presented and suggest economies, but could not discuss policy. It did not have an opportunity to discuss estimates till after they had been presented and only dealt with two or three departmental estimates each year. The Select Committee on Parliamentary Procedure which reported in 1932 recommended that the work of the Estimates Committee should be more closely linked with that of the Public Accounts Committee [3] which receives the Comptroller and Auditor-General's report on any unauthorised expenditure, and that four of the Supply Days should be allotted to the reports to Parliament of these two Committees. If committees were attached, as has been suggested, to departments, they could examine the estimates of their respective departments. But the adoption of this suggestion would involve touching upon policy and it is claimed by some that as a result the responsibility of the Executive would be diminished. During the First and Second World Wars there were appointed Select Committees of the House of Commons on National Expenditure. The committee appointed during the Second World War was confined to investigating expenditure directly connected with the war. Nevertheless, it covered a wide range of departmental expenditure and interpreted its terms of reference as enabling it to criticise freely the policy of the departments.

[1] See Appendix A, p. 422, *post.*
[2] See Part IV., Chap. 6, and Hills and Fellowes, *op. cit.*, p. 36.
[3] Part IV., Chap. 6.

Its frequent reports to Parliament received wide publicity in the press, and the resulting action of departments was also reported on by the committee. It also addressed a number of representations to the Prime Minister where on grounds of security it was precluded from issuing a public report. This committee repeated the previous recommendation for closer co-ordination between committees examining estimates and the Public Accounts Committee. They also criticised the form of the national accounts which are kept on a cash basis described by the committee as " the penny note book system." [1]

Ways and Means.

It has been shown that before any money voted on Supply can be withdrawn from the Consolidated Fund there is needed a resolution of the Committee of Ways and Means, but the more important function of that Committee is the raising of revenue. Revenue like expenditure, is raised partly under statutes that continue until repealed, partly under the authority of annual statutes. The bulk of revenue is raised by the former method, whereas in contrast the bulk of expenditure is sanctioned annually. Shortly after the opening of the financial year in April, the Chancellor of the Exchequer " opens his Budget " in Committee of Ways and Means. The traditional Budget statement falls into two parts. The first is a retrospect of the past year, comparing yield of revenue with estimated yield, and actual with estimated expenditure. The second part deals with (1) the estimated expenditure of the new year, which is already known to members and the public through the publication by March of the new year's estimates, and (2) the Chancellor's proposals for meeting it out of taxation on the existing basis, together with his intentions as to the imposition of new or the remission of existing taxation. These matters are closely guarded secrets until the Budget is opened, in order that steps may not be taken to forestall them, *e.g.* by dumping of goods or speculation on the Stock Exchange. In recent years as a result of the increased interest taken by the Government in economic affairs there has been published contemporaneously with the opening of the Budget by the Chancellor of the Exchequer a White Paper containing an analysis of the national income of the past year. From this practice, which may well be extended to include other information, such as a statement of capital expenditure, there has resulted a change in the character of the Chancellor's statement in the direction of making it as much a statement of financial policy as a mere review of the actual finance of the period.

Budget Resolutions.

Immediately after the annual Budget statement resolutions agreeing to the Chancellor's proposals are passed by the Committee of Ways and Means. These cover the rates of income-tax and sur-tax

[1] H. C. 122 of 1944.

and new customs and excise duties. Other taxes, such as death duties, which endure until varied or abolished by a Finance Act, do not require the Budget resolutions. The taxing resolutions of the Committee of Ways and Means are finally embodied in the annual Finance Act, just as the resolutions of the Committee of Supply are embodied in the annual Appropriation Act. The effect of any changes made by the Finance Act may be made retrospective to the date of the Budget, or any selected date. It was for long the practice to begin at once to collect taxes under the authority of resolutions of the Committee of Ways and Means. This practice was challenged in *Bowles* v. *The Bank of England*, [1913] 1 Ch. 57 ; K. & L., at p. 117, in which Mr. Gibson Bowles sued the Bank of England for a declaration that it was not entitled to deduct any sum by way of income-tax from dividends, until such tax was imposed by Act of Parliament. The decision given in favour of the plaintiff illustrates the fundamental principle maintained in *Stockdale* v. *Hansard* that no resolution of the House of Commons can alter the law of the land. In 1913, however, there was passed the Provisional Collection of Taxes Act, which gives statutory force for a limited period to a resolution of the Committee of Ways and Means varying an existing tax or renewing a tax imposed during the preceding year. An Act confirming such resolutions must become law within four months from the date of the resolution. The Act only applies to resolutions for the variation or renewal of customs and excise duties, income-tax and sur-tax. Though the collection of new duties may not be started until the Finance Act is passed, the Treasury may make regulations to ensure that they shall be paid in the event of their being given retrospective operation.[1] It should be noted that the control of the House of Commons over taxation is far more real than is its control over expenditure. The raising of money by loans charged on the public revenue (Consolidated Fund) also requires the authority of an Act of Parliament ; examples may be found in the War Loan Acts, 1914–19, the Austrian Loan Guarantee Act, 1933, and the National Loans Acts, 1939–45.

C.

Private Bills.

A private Bill is a Bill to alter the law relating to some particular locality or to confer rights on or relieve from liability some particular person or bodies of persons (including particularly local authorities, statutory undertakings, *i.e.* gas, water and electricity companies, and private corporations). After preliminary advertisement of the

[1] Finance Act, 1926, s. 6, *e.g.* regulations authorising customs officers to record the names of importers.

objects of the Bill, deposit of plans and other documents in Parliament, with local authorities and in other specified places, a petition for the Bill together with a printed copy of the Bill must be deposited with Parliament by November 27 each year. There is thus only one opportunity a year for the promotion of a private Bill. Provided that the other elaborate formalities required by the Standing Orders of the House in which the Bill is introduced have been complied with, the Bill receives a first reading. The second reading of the Bill does not determine, as in the case of a public Bill, its desirability, but merely that, given that the facts stated in its preamble are true, it is unobjectionable from the point of view of national policy. If read a second time, the Bill is committed to a Committee of four members in the Commons or of five members in the Lords. The functions of the Committee are to examine the Bill from the point of view of national policy and to hold the balance as between competing local and private interests. The Committee stage is a quasi-judicial proceeding at which after certain formalities the opponents of the Bill may appear. The promoters and opponents of the Bill are heard, usually by counsel, and may call evidence. It is first decided whether or not the facts stated in the preamble, which sets out the special reasons for the Bill, have been proved. If the preamble is accepted, the clauses are then taken in order. If the preamble is rejected, the Bill is dead. After the committee stage the Bill is reported to the House, and its subsequent stages are similar to those of a public Bill. A private Bill may be opposed in committee in both Houses. Private Bill procedure when a Bill is opposed is both expensive and necessarily takes time. This method of seeking statutory powers is of great importance to progressive local authorities who may seek for powers wider than those conferred by the Acts from which they derive the powers common to local authorities in general. There are, however, other means of obtaining statutory authority for the exercise of special powers, and in particular both a provisional order, confirmed by Confirmation Bill,[1] and special ministerial orders made under statute may be mentioned as of importance to-day both to local authorities and statutory undertakings as sources of their powers.

D.

Miscellaneous Functions.

Judicial Functions.

The judicial functions of Parliament—the appellate jurisdiction of the House of Lords and the process of impeachment—are discussed elsewhere.[2]

[1] Part VI., Chap. 3, at p. 241, *post*, for the procedure thereon.
[2] Part V., Chap. 1.

Petitions.

Another function of Parliament is the receiving of petitions. Any subject may petition the House of Commons, even if he seeks to impose a new charge upon the public funds, and the House decides whether or not to receive such petitions. Petitions must be presented by a member. They are referred to a select committee, which may direct their circulation among members. They may be debated.[1]

Committees of Enquiry.

Either House may set up a committee of enquiry into any matter of public importance, and a resolution to set up such an enquiry may be an expression of no confidence in the Government of the day. Such committees may be composed solely of members of Parliament or may have a wider composition. Under the Tribunals of Enquiry (Evidence) Act, 1921, both Houses of Parliament may resolve that it is expedient that a tribunal be appointed to enquire into a matter of urgent public importance. In pursuance of such a resolution a tribunal may be appointed by His Majesty or by a Secretary of State. The instrument of appointment may confer all the powers of the High Court with regard to the examination of witnesses and production of documents. A tribunal was appointed under this Act in 1936 to enquire into allegations of a leakage of Budget secrets.

Addresses of Removals.

Certain officers, such as Judges of the Supreme Court, are removable upon the presentation of an address to the Crown by both Houses of Parliament. The proceedings in relation to such an address are of a judicial character.

[1] Petitions are also occasionally presented to the House of Lords.

CHAPTER 4.

PRIVILEGES OF PARLIAMENT.

Nature of Privilege.

PRIVILEGES are an important part of the law and custom of Parliament. They concern the relations of both Houses with the King, the courts, the public, and with one another. Privilege is part of the common law and, therefore, neither House can create any new privilege, but must justify its claim on the authority of precedent. The courts, while reluctant to enquire into the exercise of privilege, so far as it concerns the internal proceedings of either House or their relations with one another, will not admit of its extension at the expense of the rights of the subject. For to do so would involve recognising that one House could change the law by its own resolution.

A.

House of Commons.

In order that neither the House collectively nor members of the House may be obstructed in the performance of their duties, there have from earliest times been attached both to the House itself and to members thereof certain privileges and immunities.

Demand of Privileges.

At the opening of each session of Parliament the Speaker formally claims from the Crown for the Commons " their ancient and undoubted rights and privileges." Those particularly mentioned are " that their persons may be free from arrests and molestations ; that they may enjoy liberty of speech in all their debates and may have access to His Majesty's royal person whenever occasion shall require ; and that all their proceedings shall receive from His Majesty the most favourable construction." The right of access is a collective privilege of the House exercised through the Speaker. The grant of these privileges is formally conveyed through the Lord Chancellor.

Freedom from Arrest.

The privilege of freedom from arrest protects a member of Parliament from arrest in civil proceedings for a period of from forty days before to forty days after a meeting of Parliament. It does not protect from arrest on a criminal charge for an indictable offence nor from preventive detention by order of the executive authority under statutory powers, *e.g.* regulations made under Defence Acts in time of war.[1] Parliament has, however, always maintained the right of receiving immediate information of the imprisonment or

[1] *Report from the Committee of Privileges*, H. C. 164 of 1940. Detention as the result of words spoken in Parliament would be a violation of the privilege of freedom of speech ; see p. 110, *post*.

detention of any member, together with the reasons for his detention. In the various Habeas Corpus Suspension Acts of the eighteenth and early nineteenth centuries [1] provision was always made that before a member was committed or detained there must be obtained the consent of the House of which he was a member. The general history of the privilege shows that the tendency has been to narrow its scope, and it does not protect from proceedings under the Bankruptcy Acts nor probably from arrest on a criminal charge for a non-indictable offence nor from proceedings for contempt of court. There is no protection in cases of refusal to give surety to keep the peace or security for good behaviour. In the case of John Wilkes the Court of Common Pleas held [2] that the privilege protected from arrest for seditious libel, but both Houses of Parliament ruled to the contrary. Since the abolition of imprisonment for civil debt (except where it is shown that a debtor has means to satisfy a judgment, but has neglected to do so) [3] the privilege has become of small importance. The privilege applied to members' servants until the passing of the Parliamentary Privilege Act, 1770.

Freedom of Speech.

The privilege of freedom of speech, though so well established as to be unquestioned, is manifestly of the first importance. In 1397 one Haxey questioned the expenses of the King's household. Haxey was condemned in Parliament as a traitor, but this judgment was reversed after the accession of Henry IV. Though this case has long been cited as an authority on privilege, it is now agreed among historians that Haxey was not a member of the Commons.[4] In Henry VIII.'s reign one Strode was imprisoned by the Stannary Court of Devon for invading the province of that court by introducing a Bill in Parliament to regulate the tin mines of that county which were within that court's jurisdiction. He was fined and imprisoned, but an Act [5] was passed declaring that any legal proceedings "for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament should be utterly void and of none effect." *Strode's Case* was a conflict between Parliament and the Stannary Court, not a conflict between the Crown and Parliament. Until the seventeenth century the Commons were more concerned with freedom to choose subjects of discussion (*e.g.* Elizabeth's marriage) than with the right to criticise the Government. In 1629 Eliot, Hollis and Valentine were convicted for seditious speeches in Parliament. The judgment was subsequently reversed in the House of Lords on the ground that words spoken

Haxey's Case.

Strode's Case.

Sir John Eliot's Case.

[1] P. 320, *post.*

[2] *The King* v. *Wilkes* (1763), 2 Wilson 151.

[3] P. 306, *post.*

[4] See J. F. Tanner, *Tudor Constitutional Documents* (Cambridge University Press), p. 555; T. F. Tout, *Chapters in Mediaeval Administrative History* (Manchester University Press), Vol. IV., pp. 18–19.

[5] 4 Hen. 8, c. 8; Statutes of the Realm, iii. 53.

in Parliament could only be judged in Parliament. Finally it was enacted by the Bill of Rights, 1689, " that the freedom of speech or debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." No action will lie against a member of Parliament for words spoken by him in the course of parliamentary proceedings, and similarly no action will lie for any publication among members of Parliament by order of the House or in the ordinary course of parliamentary business. It was held in *Lake* v. *King* (1667), 1 Saunders 131, that an action would not lie for defamatory matter contained in a petition printed and delivered to members.

Bill of Rights.

Disclosures made in Parliament either by speeches or questions may not be made the subject-matter of a prosecution under the Official Secrets Acts, 1911–39.[1] Unless there are express words in a statute overriding parliamentary privilege, no member may be proceeded against as the result of words spoken in the performance of his duty as a member of Parliament. The privilege of freedom of speech extends to words spoken outside the House of Commons if spoken in the essential performance of duty as a member, *e.g.* a conversation on parliamentary business in a Minister's private house. Conversely it does not extend to a casual conversation in the House of Commons on private affairs. A member may not without the consent of the House give evidence concerning what passes in Parliament.[2]

Official Secrets Acts.

In connection with the privilege of freedom of speech it is convenient to consider also the right of the House to secure privacy of debate, and to publish its debates and proceedings outside Parliament. Secret sessions are frequent in time of war. They are to be avoided except for imperative reasons. It is vital that the electorate should be informed of the doings of its representatives. The House has always enjoyed the right to exclude strangers. Until the eighteenth century the House resented and prevented any publication of accounts of its proceedings, but since the famous conflict between the House of Commons and John Wilkes, this privilege has not been insisted upon. The House, however, may at any time resolve that publication is a breach of privilege.

Privacy of Debate.

The right of the House to publish its proceedings otherwise than among its own members was at common law restricted by the ordinary law of defamation (libel and slander). In the case of *Stockdale* v. *Hansard* (1839), 9 A. & E. 1; K. & L. 78, Stockdale sued the publisher of certain reports containing defamatory matter, which were published by order of the House of Commons and were available for sale to the public. The defendant was ordered by the

Publication of Debates and Speeches.

[1] *Report of Select Committee on Official Secrets Acts*, H. C. 101 of 1939.
[2] *Ibid.*

House to plead that he had acted under an order of the House of Commons, a court superior to any court of law, whose orders could not be questioned; and further that the House of Commons had declared that the case was a case of privilege; that each House of Parliament was the sole judge of its own privileges; and that a resolution of the House declaratory of its privileges could not be questioned in any court of law. The Court of Queen's Bench rejected the defence, holding that only the King and both Houses of Parliament could make or unmake laws; that no resolution of any one House of Parliament could place anyone beyond the control of the law; and that, when it was necessary in order to decide the rights of private individuals in matters arising outside Parliament, courts of law should determine the nature and existence of privileges of the House of Commons. They held further that there was no privilege of the House of Commons which permitted of the publication outside the House of defamatory matter. Similarly, although a member of Parliament may speak freely within Parliament, he may be liable to proceedings for defamation if he publishes his speech outside Parliament: *The King* v. *Creevey* (1813), 1 M. & S. 278.

Parliamentary Papers.

The case of *Stockdale* v. *Hansard* was followed by the Parliamentary Papers Act, 1840, which enacted that any proceedings in respect of defamatory matter contained in a publication made by authority of the House of Lords or the House of Commons would be stayed on the production of a certificate from an officer of the House. This Act also protected in the absence of malice the publication of fair and accurate extracts from papers published under the authority of Parliament. Although not strictly connected with parliamentary privilege, it may be added that, unless a plaintiff can prove malice, a fair and accurate unofficial report of proceedings in Parliament is privileged, as is an article founded on proceedings in Parliament, provided that it is an honest and fair comment on the facts: *Wason* v. *Walter* (1868), L.R. 4 Q.B. 73; K. & L. 105. The interest of the public in the publication of parliamentary proceedings is of more importance than occasional inconveniences to individuals. This decision does not protect reports of detached parts of proceedings published with intent to injure individuals, nor does it protect the publication of a single speech which contains libellous matter: *The King* v. *Creevey* (*ante*). It was suggested in *Davison* v. *Duncan* (1857), 7 E. & B. 229, that a similar privilege attaches to the *bonâ fide* publication of a speech by a member for the information of his constituents, but it is difficult to ascertain whether a speech is circulated only to constituents.

Right to Control Internal Proceedings.

The House of Commons has the right to control its own proceedings and to provide for its own proper constitution. Except in cases of ordinary crimes committed within the precincts of Parliament,

the courts will not interfere with what takes place inside Parliament. The House lays down its own rules for the regulation of its own internal concerns and has the power to enforce those rules. This question will be discussed more fully in considering the relations between the House of Commons and the courts.

Disputed Elections.

It was for long doubtful as to whether or not the House had the right to determine questions of disputed elections. A dispute arose upon this question between James I. and the House of Commons in 1604, when one Goodwin, an outlaw, was elected for Buckinghamshire. A compromise was effected, but the Commons exercised the right to determine such questions from 1604 to 1868. They were first determined by committees, but from 1672 were determined by the whole House. The growth of party government resulted in disputed election returns being settled purely by party votes. In 1770 Grenville's Act transferred the decision of these questions to a committee chosen by lot. In 1868 Parliament entrusted the duty of deciding disputed elections to the courts. The procedure is regulated by the Parliamentary Elections Act, 1868. A petition against an election is presented to the High Court of Justice, and the trial of such petition is conducted by two judges of the High Court sitting in the borough or county in which the election took place. The determination of the court is notified to the Speaker, and is entered upon the journals of the House of Commons. Of recent years there has been an almost total disappearance of election petitions, a feature which is to the credit of public life, though no doubt the large number on the electoral roll of a modern constituency has led to the disappearance of attempts to bribe the electors.

Goodwin's Case.

Grenville's Act.

Expulsion.

The House of Commons still retains the right to pronounce upon legal disqualifications for membership, and to declare a seat vacant on such ground. The House may, however, as in the case of Mitchel,[1] refer such a question to the courts. The House of Commons cannot, of course, create disqualifications unrecognised by law, but it may expel any member who conducts himself in a manner unfit for membership. A constituency may re-elect a member so expelled, and there might, as in the case of John Wilkes, take place a series of expulsions and re-elections. Expulsion is the only method open to the House of dealing with a member convicted of a misdemeanour.

Committal for Contempt.

The House of Commons has the right to enforce its privileges and regulate its proceedings by punishing those who offend against the House. A member guilty of disorderly conduct, who refuses to withdraw, may on being named by the Speaker be suspended from the service of the House either for a specified time or for the remainder of the session. Punishment may also take the form of

[1] (1875), I.R. 9 C.L. 217.

an admonition by the Speaker, or in more serious cases of a reprimand by the Speaker, or of commitment to prison by order of the House. The House of Commons may, in virtue of its inherent and essential right to control its own proceedings and maintain its dignity, commit any person for contempt, but such commitment cannot be for a fixed term, as a prisoner is automatically entitled to release when the House is prorogued.

Payment of Members.

The right of the House of Commons to the exclusive control of financial measures,[1] and the right of impeachment [2] are more appropriately discussed when considering the financial and judicial functions of Parliament. It is convenient to refer here to the question of the payment of members of Parliament. Since 1911 every member not in receipt of an official salary has received a salary, which was raised from £400 to £600 a year by the Appropriation Act, 1937. Members, too, are sometimes paid by private bodies, *e.g.* trade unions. Lord Shaw expressed the view that a contract to pay a man in return for his support in Parliament of the views of a particular person or party would be unenforceable as contrary to public policy: *Osborne* v. *Amalgamated Society of Railway Servants*, [1910] A.C. 87, at p. 110 ff.

The Courts and Parliamentary Privilege.

Questions of privilege have been a source of conflict between the House of Commons and the courts. Parliament has always held the view that whatever matter arises concerning either House of Parliament ought to be discussed and adjudged in that House to which it relates and not elsewhere; and that the existence of a privilege depends upon its being declared by the High Court of Parliament to be part of the ancient law and custom of Parliament.[3] It has been seen that the courts, in the case of *Stockdale* v. *Hansard*,[4] maintained the right to determine the nature and limit of parliamentary privileges, should it be necessary to determine such questions in adjudicating upon disputes between individuals. In *Eliot's Case* the question whether or not the court could deal with an assault committed in the House of Commons was expressly left open when the judgment was reversed upon another ground, but there is no authority showing that crimes committed in the precincts of Parliament cannot be punished by the ordinary courts.[5] The test is not where the alleged offence took place, but whether it took place in the course of parliamentary business and as a part thereof.[6] The

[1] Chap. 3, *ante*.
[2] Part V., Chap. 1.
[3] May, *op. cit.*, p. 173.
[4] P. 111, *ante*.
[5] An attempt to convict members of the Kitchen Committee of the House of Commons of breaches of the licensing law failed, on the ground that it was impossible to apply the provisions of that law to the House of Commons, as well as on the ground of the right of the House to regulate its internal affairs: *The King* v. *Graham-Campbell, ex parte Herbert*, [1935] 1 K.B. 594; see p. 112, *ante*.
[6] See H. C. 101 of 1939, p. 111, *ante*, note 1.

present relationship between the High Court and Parliament is made clear by the cases centring round Mr. Bradlaugh. In *Bradlaugh* v. *Gossett* (1884), 12 Q.B.D. 271; K. & L. 96, the Court of Queen's Bench refused to declare void an order of the House of Commons preventing Charles Bradlaugh, who had been duly elected member for Northampton, from taking the oath. It was held that the House of Commons had the exclusive right to regulate its own proceedings, and that no court could interfere with the exercise of such right. The Parliamentary Oaths Act, 1866, permitted certain persons to make a declaration of affirmation instead of taking an oath. It was disputed whether or not Bradlaugh was a person entitled to make such a declaration. Any person making the declaration otherwise than as authorised by the Act could be sued for certain penalties. The House of Commons permitted Bradlaugh to make the declaration. In a subsequent action against Bradlaugh for penalties—*Clarke* v. *Bradlaugh* (1881), 7 Q.B.D. 38; *Bradlaugh* v. *Clarke* (1883), 8 A.C. 354—it was held that the Parliamentary Oaths Act, 1866, and the Promissory Oaths Act, 1868, did not authorise Bradlaugh to make the declaration. It is pointed out in the judgment of Stephen, J., in *Bradlaugh* v. *Gossett* that, should the House of Commons have attempted by resolution to state that Bradlaugh was entitled to make the statutory declaration, such a resolution would not have protected him against an action for penalties:

> "We should have said that for the purpose of determining on a right to be exercised within the House itself, the House, and the House only, could interpret the statute; but that as regarded rights to be exercised out of, and independently of, the House, such as the right of suing for a penalty for having sat and voted, the statute must be interpreted by this court independently of the House." [1]

In *Paty's Case* (1704), 2 Lord Raymond 1105, Chief Justice Holt, in a minority judgment, held that a writ of habeas corpus would go to release anyone committed for contempt by the House of Commons, where the cause of committal stated in the return to the writ was insufficient in law. This view of the law is accepted to-day. If, however, no cause for committal other than contempt of the House is shown in the return, the High Court is powerless. As it was said by Lord Ellenborough in *Burdett* v. *Abbot* (1811), 14 East 1: "If a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that court nor of any other of the superior courts enquire further." This opinion prevailed in *The Sheriff of Middlesex's Case* (1840), 11 A. & E. 273; K. & L. 92. Thus the House possesses an arbitrary power of

[1] The Oaths Act, 1888, now permits an affirmation in lieu of an oath in all places and for all purposes where an oath is required by law.

committal for contempt which cannot be enquired into by the courts, provided that the cause of the contempt is not stated. Such a power is not available to the Executive, both by reason of the Statute 16 Car. 1, c. 10, s. 8, which guarantees the writ of habeas corpus against committal by the King and his Council, and because of the common law which makes arbitrary imprisonment unlawful and does not recognise the plea of act of State as justifying imprisonment of a British subject by a Minister.

It appears, therefore, that there may be two views laid down as to the privileges of the House of Commons. The House may act upon one view when regulating its own proceedings and committing for contempt, while the court may act upon another view when privileges arise in civil disputes. It has, however, been pointed out many times by judges that the court will naturally pay the greatest attention to the views and customs of the House of Commons in deciding what are the privileges of that House. There is none the less a possibility of conflict which may affect the liberty of the subject.[1]

B.

House of Lords.

Privileges of the House of Lords.

The privileges of the House of Lords are:

(*a*) Freedom from civil arrest for peers for a period of forty days before and after a meeting of Parliament, as in the case of members of the House of Commons.

(*b*) Freedom of speech.

(*c*) Freedom of access to the Sovereign for each peer individually.

(*d*) The right to commit for contempt. The House of Lords can commit a person for contempt for a definite term, and the imprisonment is not terminated by prorogation of Parliament.

(*e*) The right to try and be tried by their fellow peers for treason or felony or misprision of either.[2] This privilege should more properly be described as a privilege of the peerage than of the House of Lords and extends to peeresses and the wives of peers.

(*f*) The right to exclude disqualified persons from taking part in the proceedings of the House. The House itself decides, through the Committee of Privileges, the right of newly elected peers to sit and vote.[3] Claims to old peerages are referred by the Crown to the House of Lords, and are also decided by the Committee of Privileges. This body is not bound by its own previous decisions.

[1] P. 115, *ante*.

[2] Part V., Chap. 1. Trial by peers applies also to the misdemeanour of disturbing public worship contrary to section 3 of the Act of Uniformity, 1558.

[3] P. 70, *ante*.

PART IV.

THE EXECUTIVE.

Cabinet Government, by W. I. Jennings (Cambridge University Press).
The Whitehall Series (Putnams).
The Law and Custom of the Constitution, by Sir William Anson, Vol. II., The Crown, Parts I. and II., 4th ed. by A. Berriedale Keith, for reference.

CHAPTER 1.

THE CROWN.

Introductory.

To study the organs of State which exercise the executive and administrative functions is the most difficult task that a student of constitutional law has to perform. He is, of necessity, without that acquaintance with what takes place in Cabinet meetings or within government departments which could alone give him an intimate knowledge of the machine in operation. When dealing with the Legislature and the Judiciary he is studying organs which work in the public eye. The proceedings of both Parliament and the High Court can, in time of peace, be followed with fair accuracy by anyone with sufficient leisure and inclination to peruse the columns of *The Times* from day to day. But the departments pursue their ways free from the glare of publicity. True that from time to time questions in Parliament or strictures from the Bench remind the public that Whitehall is encroaching on their liberty. Occasionally a retired civil servant gives the world a glimpse behind the scenes, but strict convention forbids any active member of that service from writing of his work.[1] For the average lawyer acquaintance with Whitehall is limited to interviews with subordinate officials, while the layman perhaps gets no further than interviews with the inspector of taxes or manager of the local employment exchange.

Terminology.

There is too another barrier. Terms are used which have no precise legal significance. Differences of form do not always represent differences of substance. The term, The Crown, represents

[1] Attention is drawn to *The Whitehall Series* (Putnams), edited by Sir James Marchant, K.B.E., LL.D. In this Series, retired permanent officials of the Civil Service have written of the departments in which most of their experience has lain.

the sum total of governmental powers and is synonymous with the Executive. In the exercise of some of the powers of the Crown the King may be called upon to exercise a personal decision ;[1] others are exercised by the King on the sole responsibility of Ministers ; in the exercise of others the King plays no part, for the majority of statutory powers are conferred upon Ministers as such and are exercised by them in their official capacity, though they are none the less exercised on behalf of the Crown. There is only a formal difference between a power conferred upon the King in Council which is exercised on the advice of the responsible Minister concerned and a power conferred directly upon that responsible Minister. The King, the King in Council [2] and the several Ministers of State are legal terms. It is only comparatively recently that the terms, Government and Prime Minister, have appeared in statutes,[3] and then only in a context which assumes their meaning to be known. The terms, Executive,[4] Cabinet, Ministry and Administration are extra-legal. The Cabinet [5] is the body of principal Ministers with whom rests the real direction of policy. We speak of the Ministry or the Administration of a particular Prime Minister with reference to the full body of political office-holders who from time to time hold the reins of government, *i.e.* the Ministers of the Crown and their Parliamentary Secretaries.

A.

The King.

Title to the Crown.

Title to the Crown is derived from the Act of Settlement, 1701 : "The Crown . . . shall remain and continue to the said most excellent Princess Sophia" (the Electress of Hanover, granddaughter of James I.) "and the heirs of her body being Protestants." The title to the Crown follows the hereditary principle, but the King in Parliament may alter the succession. The limitation to the heirs of the body means that the Crown descends, with certain exceptions, as did real property under the law of inheritance in force before 1926. This branch of property law recognised (*inter alia*) the right of primogeniture and preference for males over females. There are disqualified from the succession to the Throne Roman Catholics and those who marry Roman Catholics, and the Sovereign must join in communion with the Church of England. On the death of King George V. he was succeeded by his eldest son, the Prince of Wales

[1] P. 59, *ante*. [2] P. 122, *post*.
[3] *E.g.* Statute of Westminster, 1931 (Government) ; Ministers of the Crown Act, 1937 (Prime Minister).
[4] P. 13, *ante*. [5] P. 14, *ante*.

and heir apparent [1] who became Edward VIII. On the abdication of Edward VIII. it was provided by His Majesty's Declaration of Abdication Act, 1936, that the member of the Royal Family then next in succession to the Throne (King George VI, then Duke of York and heir presumptive [2]) should succeed and that Edward VIII., his issue, if any, and the descendants of that issue should not thereafter have any right, title or interest in or to the succession. The present heir presumptive is the Princess Elizabeth, the elder of the King's daughters. The Preamble to the Statute of Westminster, 1931, declares that it would be in accord with the established constitutional position that any alteration in the law touching the succession to the Throne or the Royal Style and Titles shall also require the consent of the Parliaments of all the Dominions.[3]

Royal Marriages.

The Royal Marriages Act, 1772, by placing certain restrictions upon the right of a descendant of George II. to contract a marriage without the consent of the Sovereign, guards against undesirable marriages which might affect the succession to the Throne. Until the age of twenty-five the King's assent is necessary (except in respect of the issue of princesses who have married into foreign families). After that age a marriage may take place without consent after a year's notice to the Privy Council, unless Parliament expressly disapproves.

Accession and Coronation.

There are two ceremonies which mark the accession of the new Sovereign. Immediately on the death of his predecessor the Sovereign is proclaimed, not by the Privy Council [4] as such, but by the Lords Spiritual and Temporal and other leading citizens, a body which is a survival of an old assemblage, which met to choose and proclaim the King. The Proclamation is afterwards approved at the first meeting of the new King's Privy Council. After an interval of time follows the Coronation, the ancient ceremony which gave religious sanction to title by election and brought to a close the interregnum, when no King reigned, between the death of one King and the election of his successor. Anson remarks that, as the recognition of hereditary rights strengthened, the importance of the election and coronation dwindled, while the great practical inconvenience of the interregnum, the abeyance of the King's Peace, was curtailed.

[1] The eldest son of a reigning monarch, who is Duke of Cornwall by inheritance and is invariably created Prince of Wales. There is no precedent for the latter title being conferred upon an eldest or only daughter who is the heir presumptive.

[2] The person at any time next in succession. *E.g.* An only daughter is heir presumptive, unless and till a son is born to the King. So, too, before his accession the present King was heir presumptive to his brother, Edward VIII., but would have ceased to be so on the birth of a child (male or female) to his brother.

[3] P. 387, *post*.

[4] P. 122, *post*.

The modern coronation ceremony is full of historical interest. There are three stages:

(1) The acceptance of their King by the people and the taking of the oath of royal duties by the King.

(2) The purely religious ceremony, which includes the anointing and crowning.

(3) The rendering of homage in person by the Lords Spiritual and Temporal.

It should be noted that the oath illustrates the contractual nature of the sovereign power and has survived both the extravagant prerogative claims of the Stuarts and the Revolution of 1688. The present form of the Coronation oath was prescribed by the Coronation Oath Act, 1688, as amended by the Acts of Union. In place of the formal declaration against transubstantiation, the Accession Declaration Act, 1910, substituted a modified declaration of adherence to the Protestant faith.

Infancy and Incapacity.

The Regency Acts, 1937 and 1943, made, for the first time, permanent provision for the infancy, incapacity and temporary absence from the realm of the Sovereign. The Sovereign comes of age at eighteen; until he reaches that age, the royal functions are to be exercised by a Regent who will also act in the event of total incapacity of an adult Sovereign. The Regent will be the next person in the line of succession, who is not excluded from the succession by the Act of Settlement and is a British subject of full age (twenty-one) domiciled in the United Kingdom. Regency is automatic on the succession of a minor; but in the case of total incapacity a declaration has to be made to the Privy Council by the wife or husband of the Sovereign, the Lord Chancellor, the Speaker, the Lord Chief Justice, and the Master of the Rolls, or any three of them, that they are satisfied by evidence (including that of physicians) that the Sovereign is by reason of infirmity of mind or body incapable of performing the royal functions; or that for some definite cause he is not available for the performance of those functions. Such a declaration must be made to the Privy Council and communicated to the Governments of His Majesty's Dominions and of India. A Regency may be ended by a similar declaration. A Regent may exercise all the royal functions, except that he may not assent to a Bill for changing the order of succession to the Crown or for repealing or altering the Act of Anne made in Scotland and entitled an Act for securing the Protestant Religion and Presbyterian Church Government.

Illness and Temporary Absence.

In the event of illness which does not amount to total incapacity or of absence or intended absence from the United Kingdom, the Sovereign may appoint Counsellors of State to exercise such of the royal functions as may be conferred upon them by letters patent.

There may not be delegated the power to dissolve Parliament otherwise than on the express instructions of the Sovereign (which may be conveyed by telegraph), or to grant any rank, title or dignity of the peerage. The Counsellors of State must be the wife or husband of the Sovereign and the four persons (excluding any persons (*a*) disqualified from being Regent, or (*b*) being absent or intending to be absent from the United Kingdom during the period of delegation) next in the line of succession to the Crown. Though disqualified from being Regent until reaching full age, the heir apparent or heir presumptive may be a Counsellor of State, if not under eighteen years of age.

Demise of the Sovereign.

Formerly the death of the Sovereign involved the dissolution of Parliament and the termination of the tenure of all offices under the Crown, since Parliament meets on the personal summons of the King, and all offices are in theory held at his will and pleasure. The Representation of the People Act, 1867, made the duration of Parliament independent of the demise of the Sovereign. If demise occurs during a dissolution and before the date fixed for the meeting of a new Parliament, the preceding Parliament is revived for six months: The Meeting of Parliament Act, 1797, s. 3.[1] The Demise of the Crown Act, 1901, provided that the holding of any office should not be affected by the demise of the Crown and that no fresh appointment should be necessary.

Abdication.

Akin to a demise of the Sovereign is his abdication. In 1936 King Edward VIII. signed a declaration of abdication to which effect was given by His Majesty's Declaration of Abdication Act, 1936. This Act enacted that there should be a demise of the Crown upon the Act receiving the royal assent and provided for the exclusion of Edward VIII. and his issue from the succession to the Throne. Prior to the signature of the declaration of abdication the King's intention had been communicated informally to the Dominion Governments by the Prime Minister of the United Kingdom. Upon signature the declaration was formally communicated to the Dominion Governments and the necessary Dominion legislation followed.[2]

Duties of the King.

No attempt can be made to list the duties which fall to the King to perform in person. Innumerable acts of government require his participation. Innumerable State papers require his signature. The Prime Minister keeps him informed of all conclusions of the Cabinet. As a constitutional monarch he is bound to act on the advice of his Ministers. He may, however, temper their counsel and offer guidance from his own fund of experience in affairs. But he cannot reject the final advice they offer without bringing about their resignation and replacement by other Ministers to advise him. He holds formal meetings of his Council, gives audiences, *e.g.* to colonial

[1] See also Part III., Chap. 2, *ante*.

[2] P. 388, *post*.

governors and ambassadors, receives the credentials of foreign diplomatic representatives, holds investitures and confers honours and decorations. Not only are all honours conferred by him, but his consent is needed for all those major appointments in Church and State which are made by the Crown on the advice of the Prime Minister, Lord Chancellor and other Ministers. The King and his Consort, and all the members of the Royal Family, play a leading part in the ceremonies of public life and the social and charitable life of the nation.[1] Finally and perhaps most important of all, the King is the constitutional (and personal) link that binds together the component parts of the British Commonwealth of Nations.

Private Property.

The King may hold private property in his personal capacity, *e.g.* the Sandringham estate in Norfolk. Such property, unlike Crown property,[2] is liable to rates and taxes, but even in his personal capacity the King cannot be sued.[3]

B.

The King in Council.[4]

The King was formerly the sole repository, in theory of law, of executive power, which he executed by and with the advice of his Privy Council. Despite the many powers conferred by modern statutes on individual Ministers, the Order in Council remains a principal method of giving the force of law to acts of the Government. It has been seen above that the King executes a large number of documents, under his own hand or a facsimile thereof. But the Order in Council is the document in general use for giving effect to the more important executive orders. A Royal Proclamation is issued when it is desired to give wide publicity to the action of the King in Council, as for the purpose of dissolving a Parliament and summoning its successor. Nowadays Orders in Council are approved by the King at a meeting of the Council to which only four or five members are summoned and are authenticated by the signature of the Clerk of the Council. Constitutional history shows both the decline in the advisory and judicial functions of the Council and its supersession in the former capacity by the Cabinet. To-day the acts of the Privy Council are purely formal and give effect to orders which are usually drawn up by government

[1] Appendix C includes specimens of some documents which require the royal signature. For a fuller account of the functions of the King, see Bagehot, *The English Constitution* (Clarendon Press), Chaps. II., III.; Jennings, *Cabinet Government*, Chap. XI.; Sir Sidney Low, *The Governance of England* (Fisher Unwin), Chap. XIV.

[2] P. 266, *post.*

[3] P. 263, *post.*

[4] See Baldwin, *The King's Council in the Middle Ages* (Clarendon Press), and Dicey, *The Privy Council* (Arnold Prize Essay) (Macmillans), for historical accounts of the Privy Council.

departments. These orders are made either under the prerogative,[1] *e.g.* legislation for a colony with a non-representative assembly, or under an Act of Parliament, *e.g.* orders giving effect to university and college statutes under the Universities of Oxford and Cambridge Act, 1923.

Council Committees.

The Council, having ceased to be an advisory Council of the Crown, is summoned for the purpose of making orders, issuing proclamations or performing formal State acts, such as admission to ministerial office. A few traces remain of its former advisory functions; the Committee for Channel Islands business is a survivor of the old Standing Committees appointed by the King at the beginning or in the course of his reign. Other standing committees are the Judicial Committee of the Privy Council [2] and a committee to consider grants of charters to municipal corporations. There are also Committees of the Privy Council for Scientific and Industrial, Medical and Agricultural Research, each with advisory councils of leading scientists. The Department of Scientific and Industrial Research is linked to the first of these Committees. The Lord President of the Council, a Cabinet Minister, is responsible for the work of this department, as also for the activities of the Medical and Agricultural Research Councils, for all duties imposed by statute on the Privy Council and for the formal business transacted by the Privy Council Office under the Clerk of the Council.

Office of Privy Councillor.

The office of Privy Councillor is to-day an office of honour. Appointments are made by the King on ministerial advice. By convention all Cabinet Ministers become Privy Councillors, since the oath (or affirmation in lieu of oath) binds to secrecy. Members of the Royal Family and holders of certain high offices of a non-political character, such as Archbishops and Lords Justices of Appeal, are sworn members of the Council. In addition the office is a recognised reward for public and political service, and appointments of this nature usually figure in the New Year and Birthday Honours Lists. The Council numbers about 330 members at the present day. Members are entitled to the prefix, "Right Honourable." Alienage is a disqualification, but on naturalisation an alien becomes qualified for membership: *The King* v. *Speyer*; *The King* v. *Cassel*, [1916] 1 K.B. 595; [1916] 2 K.B. 858.

Relation of Cabinet to Council.

The functions of the Privy Council are distinct from those of the Cabinet. The former is a body which gives formal approval to certain acts of the Government; the latter is deliberative. Although all members of the Cabinet are Privy Councillors, it is not as a Committee of the Council that they meet, but as "His Majesty's Servants." The Cabinet is summoned by the Prime Minister. The Council is convened by the Clerk of the Council, whose office dates

[1] P. 128, *post.* [2] Part X., Chap. 5, *post.*

back to the sixteenth century. The only connecting link between the modern Cabinet and the Council is the oath and obligation of secrecy which binds Cabinet Ministers as members of the Council; but it should be remembered that the first use of the term, Cabinet, was to describe inner bodies of the Privy Council.

House of Lords as Council of the Crown.

The House of Lords is still in theory a Council of the Crown. It has not been summoned, as such, since 1688, but traces of its former function are preserved in the writ of summons. Moreover, it is the privilege of a peer to seek individual access to the Sovereign, though the privilege may not be used by peers as such for the purpose of tendering advice on their own initiative on matters of government.

C.

The Royal Prerogative.[1]

At most periods in our history the term, prerogative, has been used to connote rights and capacities of the Crown which have little in common one with another except that in the words of Blackstone they are based on that "special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity." [2] This chapter is primarily concerned with those powers which may be exercised by the Crown without the authority of Parliament. It is none the less necessary to explain other uses of the word, prerogative, and to touch briefly on the history of the prerogative, some understanding of which is essential for understanding the present law.

The Middle Ages.

The mediaeval King was both feudal lord and head of the State. As chief feudal lord and in theory the owner of all land the King had all the rights of a feudal lord and in addition certain exceptional rights over and above those of all other lords. Like other lords the King could not be sued in his own courts; as there was no lord superior to the King there was no court in which the King could be sued. In addition the King as head of the State had powers accounted for by the need for the preservation of the State against external foes and an "undefined residue of power which he might use for the public good." [3] We have already seen [4] that mediaeval lawyers did not regard the King as being above the law. Moreover certain of the royal functions could only be exercised in certain ways. The common law courts were the King's courts and only through them could the King decide questions of title to land and punish felonies. Yet as the fountain of justice the King possessed a

[1] The student should study both the cases and introductory chapters in Keir and Lawson, *Cases in Constitutional Law*, pp. 31–70. We express our obligation to the authors, on whose ideas and historical summary we have freely drawn.

[2] 1 Bl. Comm. 232. [3] K. & L., p. 32. [4] P. 45, *ante*.

residuary power of doing justice through his Council where the courts of common law were inadequate. Normally mediaeval writers used the term, prerogative, only of those rights which appertained to the King as feudal lord, but sometimes it was used to include all those rights, powers and capacities which were derived from the King's pre-eminence.

The Seventeenth Century.

The history of the royal prerogative is inseparably connected with the history of parliamentary sovereignty and the alliance between common lawyers and Parliament. In outline that story has already been told.[1] The common lawyers asserted that there was a fundamental distinction between what came to be called the ordinary as opposed to the absolute prerogative. The ordinary prerogative meant those royal functions which could only be exercised in defined ways and involved no element of royal discretion. Thus the King could not himself act as a judge; he must dispense justice through his judges: *Prohibitions del Roy* (1607), 12 Rep. 63; K. & L. 276. The King too could only exercise legislative authority through Parliament: *The Case of Proclamations* (1611), 12 Rep. 74; K. & L. 63.[2] The absolute or extraordinary prerogative meant those powers which the King could exercise in his discretion. It was round the absolute prerogative that the seventeenth-century struggle between King and Parliament centred. The King had undoubted powers to exercise discretion in the interest of the State, especially in times of emergency,[3] but the claims of the Stuart Kings in this regard could not be reconciled with the growing claims of Parliament.[4] The contest could not be settled as a matter of law and indeed involved the execution of one King and the expulsion of another. None the less the rival theories and very real difficulties involved are best understood by a study of the leading cases, most of which were decided in favour of the Crown. The great taxation cases, *Bates' Case* and *The Case of Ship Money* have already been discussed;[5] so too have the cases relating to the dispensing power, *Thomas* v. *Sorrell* and *Godden* v. *Hales*.[6] Another case of the first importance was *Darnel's* or *The Five Knights' Case* (1627), 3 St. Tr. 1; K. & L. 37; where it was held that it was a sufficient answer to a writ of habeas corpus to state that a prisoner was detained without cause shown *per speciale mandatum regis* (by the special order of the King). No better example can be given of the problem of the absolute prerogative. It was the law that the

[1] Part II., Chap. 2, A, *ante*. [2] P. 29, *ante*.

[3] The absolute prerogative covered a wider field than the King's rights to take extraordinary action to meet emergencies. It was primarily around the King's emergency powers that the seventeenth-century struggle turned, but the rights to pardon a criminal or grant a peerage were also part of the absolute as opposed to the ordinary prerogative. They could be exercised at the King's discretion.

[4] P. 30, *ante*. [5] P. 30, *ante*. [6] P. 31, *ante*.

King had a right to exercise a power of preventive arrest which could not be questioned by the courts. In *Darnel's Case* this power was used to enforce taxation levied without the consent of Parliament. The right of Parliament to control taxation came into conflict with a prerogative power recognised by law. The arbitrary power of committal was declared illegal by the Petition of Right, 1628, and the Statute of 1640 (16 Car. 1, c. 10, s. 8) guaranteed to the subject the writ of habeas corpus against the King and his Council.

The Solution of the Problem.

The problem of the prerogative was solved in two stages. The first stage is that of the seventeenth-century struggle culminating in the Revolution Settlement of 1689. The Bill of Rights declared illegal certain specific abuses of the prerogative. Moreover the Settlement marked the final triumph of the view that there was no extraordinary prerogative above the law. It is in this sense that a prerogative power may be described as a common law power. Derived from this ancient pre-eminence of the Crown they are those powers which the common law recognises as exercisable by the King. The powers so recognised are many and important, *e.g.* the right to summon and dissolve Parliament, the right to declare war and make peace. There was, however, even after 1689 scope for conflict between King and Parliament. The second stage (1689–1832) is the growth of responsible government and the establishment of a constitutional monarchy, as it is understood to-day.[1] The meaning of responsible government has already been explained.[2] It became established that the prerogative powers could only be exercised through and on the advice of Ministers responsible to Parliament.

The Prerogative to-day.

The King is still the personification of the State. Parliament is summoned and dissolved by the King; the powers of Ministers are the powers of the Crown; the courts are the King's courts. The term, prerogative, is sometimes used to include both the common law and the statutory powers of the Crown. It is, however, preferable to confine it to common law powers. It is also sometimes used in the sense, that is now perhaps archaic, of certain of those attributes of the King which result from his headship of the State. Thus the term, prerogative of perfection, is used of the rule that the King can do no wrong; prerogative of perpetuity, of the rule that the succession of one King is simultaneous with the death of his predecessor. The living meaning of the prerogative to-day is, however, that group of powers of the Crown not conferred by statute but recognised by law as belonging to the Crown.

The Exercise of the Prerogative.

The prerogative powers of the Crown are with very rare [3] exceptions to-day exercised by the Government of the day. For their

[1] P. 10, *ante*.
[2] P. 60, *ante*.
[3] *E.g.* the choice of a Prime Minister; see p. 59, *ante*.

exercise, just as for the exercise of statutory powers, Ministers are responsible to Parliament. There is, however, a practical difference of no little importance. For the exercise of a prerogative power the prior authority of Parliament is not required. Thus, to take but one example, the Crown may grant a new constitution to a colony which has no representative legislature without first consulting or even informing Parliament. Parliament may criticise Ministers for the advice which they give in regard to the exercise of the prerogative; Parliament too may abolish or curtail the prerogative [1] by statute; but in regard to the exercise of the prerogative Parliament has no right to be consulted in advance. Certain prerogative powers could of course only be exercised if the Government were assured of parliamentary support. The Crown may declare war, but no Government could take the risk of declaring war without being assured of popular support, and Parliament alone can vote supplies to enable war to be waged. Although the contents of the prerogative depend largely upon historical causes, it will be found that they can be justified on grounds of convenience and political wisdom. Prerogative powers are mainly those the exercise of which cannot wisely be discussed in a deliberative assembly, *e.g.* the disposition of the armed forces; appointments to the Civil Service; the grant of honours to individuals. Even more is this true of the powers of the Crown in relation to foreign affairs which in this book are described as acts of State.[2]

The Prerogative and the Courts.

It has been said that prerogative powers are those powers which the law recognises as belonging to the Crown other than powers conferred by statute. If an individual disputes the validity of an act purporting to be done under the prerogative, the courts will investigate whether or not the alleged prerogative power exists. Once, however, its existence and extent are established, the manner of its exercise can only be questioned in Parliament. The mere plea of State necessity will not, however, serve to protect anyone accused of an unlawful act towards a subject. This is a cardinal principle of the English law. "With respect to the plea of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions": *per* Lord Camden, C.J., in *Entick* v. *Carrington* (1765), 19 St. Tr. 1030; K. & L. 145. There is a clear distinction between the mere plea of State necessity and reliance upon a prerogative power recognised by law.

The Prerogative and Acts of State.

By virtue of his pre-eminence as head of the State the King exercises numerous powers in the realm of foreign affairs. Acts done in the exercise of such powers are generally known as acts of

[1] P. 130, *post.* [2] Part IV., Chap. 9, *post.*

State. Whether these powers may rightly be described as prerogative powers is a matter of argument. In this book they will be treated separately [1] and the term prerogative powers will be confined to the power and authority of the King in relation to his own subjects, and not rights vested in him in relation to persons owing no allegiance to him.[2]

Powers relating to the Legislature.

Mention may now be made of a few of the major prerogative powers. By virtue of the prerogative the King summons, prorogues and dissolves Parliament.[3] The royal prerogative to create peers may be used on the advice of the Government to ensure the passage of a Bill through the House of Lords.[4] The King has a right as an integral part of the Legislature to assent or refuse to assent to Bills.[5] The Crown may by Order in Council or letters patent legislate under the prerogative for certain colonies.[6]

Prerogatives relating to the Judiciary.

All criminal prosecutions are brought in the name of the Crown. The Crown may stop a prosecution by the entry of a *nolle prosequi*, a prerogative power exercised by the Attorney-General.[7] The Crown too may pardon convicted offenders or remit or reduce a sentence on the advice of the Home Secretary.[8] It is by virtue of the prerogative that the Crown grants special leave to appeal from courts throughout the Empire to the Judicial Committee of the Privy Council.[9]

Prerogatives relating to the Armed Forces.

The King is commander-in-chief of all the armed forces of the Crown. The Navy, though its recruitment and discipline are regulated by statute (Naval Enlistment Acts, 1835 to 1884, and Naval Discipline Acts, 1866 and 1884), is a prerogative force maintained without any direct statutory authority. The Bill of Rights prohibits the keeping of a standing army within the realm in time of peace without the consent of Parliament, and this prohibition includes all forces serving on land. The Army, Air Force and Marines are legalised by an annual Act of Parliament.[10] Their control, organisation and disposition are within the prerogative. All officers of the Army and Air Force hold their commissions from the King; naval officers are appointed by the Lords Commissioners of the Admiralty under the authority of their royal commission.

Appointments and Honours.

The King appoints Ministers and Judges of the Supreme Court and makes appointments to all the principal offices in Church and State. Appointments to all posts in the Civil Service are appointments to the service of the Crown, though made by and in the name of ministerial heads of departments. The King too is the sole

[1] Part IV., Chap. 9, *post.*
[2] See *per* Warrington, L.J., in *In re Ferdinand, Ex-Tsar of Bulgaria,* [1921] 1 Ch. 107, at p. 139.
[3] Part III., Chap. 2, *ante.* [4] Part III., p. 71, *ante.* [5] Part III., p. 95, *ante.*
[6] Part X., Chap. 2, A., *post.* [7] P. 211, *post.* [8] P. 211, *post.*
[9] Part X., Chap. 5, *post.* [10] See Part IX., Chap. 1, *post.*

fountain of honour and alone can create peers and confer honours and decorations.

Monopolies.

Grants of monopolies by the Crown were bad at common law except in the case of patents for new inventions: *The Case of Monopolies* (1602), 11 Co. Rep. 84, where there was held void a grant of the sole right to make and import playing cards. The Statute of Monopolies, 1624, a declaratory Act, controlled the Crown's power to grant to first inventors the monopoly of working new inventions. This statute formed the basis of modern patent law, now regulated by the Patents and Designs Acts, 1907 to 1942. The Statute of Monopolies recognised the rights of corporations, companies and societies of merchants and in 1687 the court held that a grant of the sole right of trading to the East Indies was valid: *East India Co.* v. *Sandys* (The Great Case of Monopolies) (1685), 10 St. Tr. 371; but in 1694 the House of Commons resolved that, unless prohibited by Parliament, all have an equal right of trading with the King's dominions.

Miscellaneous Prerogatives.

Other prerogative powers relate to the creation of corporations by royal charter; the erection and supervision of harbours; the guardianship of infants and persons of unsound mind; the administration of charities; coinage; the grant of franchises, *e.g.* markets, ferries and fisheries; the right to treasure trove[1]; the sole right of printing or licensing others to print the Bible, the Book of Common Prayer and State papers.

The Prerogative in time of National Emergency.

The declaration of war and making of peace will be considered in connection with acts of State.[2] The extent of the prerogative powers in time of grave emergency cannot be precisely stated, and in modern times the Executive takes statutory powers to meet emergencies.[3] That they are wide was admitted by Hampden's counsel in the *Case of Ship Money*[4]; nor save in regard to taxation were they abridged by the Bill of Rights. In time of sudden invasion or formidable insurrection the King may demand personal service within the realm.[5] Either the Crown or a subject may invade the land of another to erect fortifications for the defence of the realm: *The Case of the King's Prerogative in Saltpetre* (1607), 12 Rep. 12; K. & L. 325, but this right, like the right to take all necessary measures to repel the King's enemies in time of war or to restore order in time of insurrection, should probably not be regarded as a prerogative power.[6] It is a duty rather than a right and is shared by the Crown with all its subjects.

Requisition.

The Crown may under the prerogative requisition British ships in

[1] P. 230, *post*.
[2] Part IV, Chap. 9, *post*.
[3] Part VIII., Chap. 2, *post*.
[4] P. 30, *ante*.
[5] Chitty, *Prerogatives of the Crown*, p. 49.
[6] Part IX., Chap. 2, *post*; K. & L., p. 376.

territorial waters in time of urgent national necessity, not restricted to invasion or imminent danger: *The Broadmayne*, [1916] P. 64, at p. 67; *Crown of Leon* v. *Admiralty Commissioners*, [1921] 1 K.B. 595.[1] By the right of angary according to international law and also British municipal law, the Crown may, in time of war, requisition any chattels (not only ships) belonging to a national of a neutral State found within the realm, but compensation must be paid[2]: *Commercial and Estates Co. of Egypt* v. *Board of Trade*, [1925] 1 K.B. 271.

Ne exeat regno.

By the common law writ of *ne exeat regno* the Crown may restrain a person from leaving the realm to evade justice, *e.g.* an absconding debtor. The Crown may probably by virtue of the prerogative restrain a British subject from leaving the realm in time of war, or recall him from abroad, but in modern times entry and exit in time of war are controlled by statutory powers.

Prerogative Powers and Statute Law.

Many prerogative rights have been regulated by statute. Thus the care of lunatics is now regulated by the Lunacy and Mental Treatment Acts, 1890 to 1930, and statutory regulations made thereunder. It was not, however, until 1920 that it was clearly established that, where statutory powers are conferred covering the sphere of a prerogative power, the Crown must proceed under the statutory powers and cannot rely upon the prerogative. Acts of Parliament may by express words abrogate a prerogative power; but the mere fact that a statute covers the sphere of a prerogative power merely suspends its exercise, but does not abrogate it. The relationship between prerogative and statutory powers was clearly laid down by the House of Lords in *Attorney-General* v. *De Keyser's Royal Hotel*, [1920] A.C. 508; K. & L. 325.

> An hotel was required for the purpose of housing the administrative staff of the Royal Flying Corps during the First World War. The Army Council offered to hire the hotel at a rent, but, negotiations having broken down, possession was taken of the premises under the Defence of the Realm Acts and Regulations made thereunder. A petition of right was brought against the Crown claiming compensation as a matter of right for the use of the hotel by the army authorities. (At the time that the Army Council took possession the Royal Flying Corps had not been superseded by the Royal Air Force and was under the control of the War Office.)
>
> It was argued for the Crown that there was a prerogative to take the lands of the subject in case of emergency in time of war, and that no compensation was payable as of right for land so taken. This argument overlooked the provisions of the Defence Act, 1842, which

[1] The right of requisition probably extends to British ships, wherever they may be: "The Power of the Crown to Requisition British Ships in a National Emergency," by Sir William Holdsworth, 35 *L.Q.R.*, p. 12. Compensation is probably payable: see p. 317, *post*.

[2] "The Right of Angary," by W. I. Jennings, 3 *C. L. J.*, p. 1.

had been incorporated into the Defence of the Realm Acts. These provisions imposed conditions upon the compulsory acquisition of land and provided for payment of compensation *as a matter of right* to persons whose land had been taken.

The argument on behalf of the owners of the hotel was that in fact the Crown had taken possession under the statutes and regulations and so could not fall back on the prerogative right, under which no compensation could be claimed, except as a matter of grace.

Both the Court of Appeal and the House of Lords rejected the argument of the Crown, and held that the prerogative had been superseded for the time being by the statute, and therefore the Crown was not in any event entitled to act under the prerogative. There can be no excuse for reverting to prerogative powers when the Legislature has given to the Crown statutory powers which cover all that can be necessary for the defence of the nation, and which are moreover accompanied by safeguards to the individual which are in agreement with the demands of justice. It may be noted in passing that the courts were prepared to hold, had it been necessary, that the alleged prerogative to requisition land in time of war without paying compensation had not been proved.

The Emergency Powers (Defence) Act, 1939, s. 9, passed immediately before the outbreak of the Second World War expressly provided that the powers which it conferred should be additional to any powers exercisable under the prerogative.[1]

Cf. p. 323, *post.*

CHAPTER 2.

MINISTERS OF THE CROWN.

Introductory.

THERE have already been studied the Cabinet system in brief outline:[1] the relationship between the Executive and the Legislature;[2] and the meaning of ministerial responsibility.[3] The story of the gradual development of the Cabinet system has been told.[4] It is now necessary to consider the composition and machinery of the Cabinet and the other organs of central government. The determination of policy and the general supervision and co-ordination of all aspects of government is, as we have seen, the responsibility of the Cabinet. The execution and often the initiation of policy is the task of the various government departments. Departments are presided over by Ministers who may or may not be members of the Cabinet. They are staffed by permanent civil servants. In addition to the government departments presided over by Ministers there are also, as has already been mentioned,[5] certain independent authorities exercising functions of central government, but not directly responsible to Parliament through a Minister of the Crown.

Ministers.

Ministers of the Crown are those members of the political party, or coalition of parties, in power who hold political office. They are appointed by the Crown on the nomination of the Prime Minister. The term, Minister, is usually confined to the ministerial heads of government departments, who are sometimes called Ministers of Cabinet Rank, but the Ministry includes also junior Ministers who hold subordinate office in the Government. Each ministerial head of a department has one or more Parliamentary Secretaries[6] and there are other junior ministerial posts, *e.g.* Junior Lords of the Treasury who act as Government Whips.[7] There is no legal limit to the number of Ministers, but salaries are provided by statute for only a fixed number of ministerial posts. To provide a salary for an additional Minister without special legislation necessitates special provision in the annual Appropriation Act, and such a method of increasing the number of political office-holders is not viewed with favour by the Public Accounts Committee.[8] It has,

[1] Part I., Chap. 2.
[2] Part II., Chap. 1, and Part III., Chap. 3.
[3] Part II., Chap. 4.
[4] Part II., Chap. 2, A.
[5] P. 17, *ante*. See Chap. 10, *post*.
[6] When the Minister is a Secretary of State, the Parliamentary Secretary is entitled Parliamentary Under-Secretary of State.
[7] P. 155, *post*.
[8] P. 156, *ante*; see W. I. Jennings in 2 *Modern Law Review*, p. 145.

however, been used during the Second World War, for example in the appointments of Ministers resident in the Middle East, Washington and North Africa, and of the Minister of Reconstruction.

Ministerial Salaries.

Apart from the Lord Chancellor [1] and the Law Officers of the Crown [2] the salaries of Ministers are regulated by the Ministers of the Crown Act, 1937.[3] The Prime Minister, if, as he usually does, he also holds the office of First Lord of the Treasury, receives an annual salary of £10,000 and an annual pension of £2,000.[4] A salary of £2,000 a year is paid to the leader of the Opposition—the leader of the party in opposition to His Majesty's Government having greatest numerical strength in the House. The Chancellor of the Exchequer, eight Secretaries of State,[5] the President of the Board of Trade, the Ministers of Agriculture and Fisheries, Education, Health, Labour,[6] Transport,[7] for the Co-ordination of Defence,[8] Supply,[9] Town and Country Planning,[10] National Insurance,[11] Fuel and Power [12] and Civil Aviation [13] receive salaries of £5,000 a year. All these Ministers are not necessarily members of the Cabinet, but their salary does not depend upon Cabinet membership. The Lord President of the Council, the Lord Privy Seal, the Postmaster-General and the Minister of Works receive salaries of £3,000 a year raised to £5,000 a year, if they are members of the Cabinet. The salary of the Chancellor of the Duchy of Lancaster, who receives £3,000 a year from Duchy funds, may similarly be raised to £5,000 a year by Cabinet membership. The Minister of Pensions receives a salary of £2,000 a year. All ministerial salaries are maximum salaries and there is expressly preserved the right of the House of Commons to move the reduction of a Minister's salary in order to call attention to a grievance or censure the conduct of a departmental activity. A Minister does not draw his salary as a member of Parliament while holding office.

[1] The Lord Chancellor receives £10,000, of which £4,000 is charged on the House of Lords Vote and £6,000 on the Consolidated Fund: see Supreme Court of Judicature Act, 1925, s. 12.

[2] The Law Officers receive salaries of £4,500 (Attorney-General) and £4,000 (Solicitor-General), together with fees for litigation.

[3] In the case of Ministries created since 1937 provision is made for the payment of salaries out of funds provided by Parliament.

[4] Provided that he is not in receipt of any salary from public funds.

[5] Pp. 143–4, *post*.

[6] During the Second World War entitled Minister of Labour and National Service.

[7] During the Second World War entitled Minister of War Transport.

[8] This post fell into abeyance in 1940 when the Prime Minister took office as Minister of Defence as well as First Lord of the Treasury.

[9] Ministry of Supply Act, 1939.

[10] Minister of Town and Country Planning Act, 1943.

[11] Ministry of National Insurance Act, 1944.

[12] Ministry of Fuel and Power Act, 1945.

[13] Ministry of Civil Aviation Act, 1945.

Parliamentary Under-Secretaries.

The Ministers of the Crown Act, 1937, provided for the payment of salaries to a fixed number of Parliamentary Secretaries and five junior Lords of the Treasury.[1] The Act allowed for two Parliamentary Secretaries to the Treasury (the Parliamentary Secretary (Chief Whip) and the Financial Secretary); three[2] for the Board of Trade, including the Secretary to the Department of Overseas Trade [3] and the Secretary of Mines whose post was abolished during the Second World War on the creation of the Ministry of Fuel and Power; two each for the Foreign Office, War Office and Admiralty (the Financial Secretary to the Admiralty and the Civil Lord); and one each for all other departments. The salaries range from £3,000 to the Parliamentary Secretary to the Treasury to £1,200 to the Assistant Postmaster-General. The Junior Lords of the Treasury receive £1,000 a year. Later Acts creating new Ministries, Supply, Town and Country Planning, National Insurance, Fuel and Power and Civil Aviation, have provided for the payment of salaries to additional Parliamentary Secretaries.

Second World War.

The Ministers of the Crown (Emergency Appointments) Act, 1939,[4] provided for the payment out of funds provided by Parliament of such salaries as the Treasury might determine to additional Ministers and their Secretaries appointed for the purpose of exercising functions in connection with the prosecution of any war in which His Majesty might be engaged. A series of Defence Regulations [5] varied the permitted number of Parliamentary Secretaries allotted to departments by the Act of 1937.

Ministers in Parliament.

It is a convention that ministerial office-holders should be members of one or other House of Parliament. Indeed such membership is essential to the working of parliamentary government. It ensures contact between the Executive and the Legislature and enables Ministers to expound policy. Moreover, it is essential to the working of the parliamentary system that members should be exposed to parliamentary questions not only from the Opposition, but also from members of their own party. It is not, however, a rule of law that a Minister must be in Parliament, and a Minister who is defeated at an election usually continues in office while seeking election in another constituency. As has been seen,[6] the provisions of the Ministers of the Crown Act, 1937, limit the number of Ministers who may sit at any one time in the House of Commons and thus ensure indirectly that there should be ministerial representation in the House of Lords. It has often been suggested that Ministers should be able to speak and defend their policy in either House of

[1] P. 155, *post*.
[2] Reduced to two by Minister of Fuel and Power Act, 1945, 2nd Schedule.
[3] P. 146, *post*.
[4] Part III., p. 82, *ante*.
[5] Part III., p. 82, *ante*.
[6] Part III., Chap. 1.

Parliament, thus enabling the best man, whether peer or commoner, to be appointed to any post.

Ministers and the Civil Service.

However technical may be the work of a government department, its head is a Minister usually appointed because of his general capacity and political experience and not because of expert knowledge. Nowhere is the practice so open at first sight to criticism as in the case of the three Service Departments, the War Office, the Admiralty and the Air Ministry. The positions of a solicitor-politician or a trade union leader in control of army affairs and a co-operative expert in charge of the Admiralty present more apparent anomalies than those of a university don at the Board of Education, or a financial expert as Chancellor of the Exchequer—to illustrate from office-holders of the twentieth century. There is little doubt that the technical work of government can only be carried on by a permanent civil service (assisted by other expert Crown servants in the case of the Service Departments), enjoying security of tenure, so far as political fluctuations are concerned. But at the same time the traditions of such service incline to routine methods. Again the higher officials have not the business man's expectation of pecuniary gain, nor perhaps the professional man's hope of fame and fortune. For the ministerial head of a department there is the political stimulus, the hope of public advancement, and the publicity afforded by criticism in Parliament, which he must answer, and from the press and public, who may, sooner or later, drive him and his colleagues from office.

In the case of the Service departments in particular, both the Cabinet and Parliament are more likely to acquiesce in the financial demands of a department, if they are presented by a civilian or non-expert who has no particular temptation towards excessive expenditure. Secretaries of State for War do not become famous on account of the amount of public money they cause to be expended, but a professional soldier, if put in a similar position at the head of the War Office in peace time, might be prejudiced from the outset by a desire to maintain his personnel and equipment at the highest margin of security. It is better that the technical advisers of these departments should not come direct to Parliament as the heads of the Service in which they have spent their professional lives, but should voice their demands through the political head of the department. What may be lost in departmental efficiency may be gained by the introduction of outside opinion and incentive.

CHAPTER 3.

THE CABINET.

Cabinet a conventional body.

THOUGH the existence of the Cabinet has been recognised by the provision in the Ministers of the Crown Act, 1937, of salaries for those Ministers who are members of the Cabinet, the Cabinet is a conventional organ of government. No statute or rule of common law regulates its composition or lays down its powers. The Cabinet is merely that body of the King's servants whom the Prime Minister invites to join him in tendering advice to the King on the government of the country. Cabinet Ministers are chosen by the Prime Minister from the leading members of his party or in the case of a coalition from the two or more parties forming the coalition.

Composition of the Cabinet.

No Minister can claim by virtue of his office to be included in the Cabinet, though in peace time there may be said to be a convention that certain offices carry with them a seat in the Cabinet, *e.g.* the Lord Chancellor, the Chancellor of the Exchequer, the Secretaries of State, the Ministers in charge of departments responsible for the principal social services, *e.g.* Health, Education, Labour. In addition there are usually included in the Cabinet two or three members with few, if any, departmental duties, *e.g.* the Lord President of the Council and the Lord Privy Seal. These Ministers, whose executive duties are very few, are free to assist the Prime Minister on special problems, or to co-ordinate different aspects of a single problem.

The Prime Minister.

Like the Cabinet the office of Prime Minister is conventional, though its existence has been recognised by statutes.[1] We have seen how the Prime Minister is chosen by the King.[2] It is customary for the Prime Minister to hold the office of First Lord of the Treasury, though this practice has not been invariable. The Prime Minister may also hold other offices, *e.g.* Lord Salisbury was for a long time Prime Minister and Secretary of State for Foreign Affairs, while the leader of the House of Commons was First Lord of the Treasury. Lord Salisbury was the last Prime Minister to sit in the House of Lords. Since the passing of the Ministers of the Crown Act, 1937, it is probable that the Prime Minister will always hold the post of First Lord of the Treasury, and Dr. Jennings has suggested [3] that

[1] Chequers Estate Act, 1917; Ministers of the Crown Act, 1937: see p. 134, *ante*.

[2] P. 59, *ante*.

[3] 2 *Modern Law Review*, pp. 145–47.

the statutory association of these two offices recognises the convention that the Prime Minister should be in the House of Commons in view of the fact that that House exercises financial control. As First Lord of the Treasury the Prime Minister is head of the establishments board of the Treasury and his approval is required for appointments to the principal civil service posts, *i.e.* those of permanent heads or deputy heads of departments and principal financial and establishments officers. All the more important Crown appointments are filled on the Prime Minister's nomination, *e.g.* governor-generalships, bishoprics and the highest judicial appointments.[1] He also advises the Crown in regard to the creation of peerages, appointments to the Privy Council and grant of honours for political and other general services,[2] and appointments to those university professorships which are in the gift of the Crown. The ascendancy of a Prime Minister over his colleagues must vary with the personality of the particular Prime Minister, but it is understood that Ministers who are not prepared to accept the Prime Minister's decision must tender their resignation. Cabinet decisions are not always taken by a majority vote.[3] On the other hand a Prime Minister cannot govern without the aid of colleagues who command the confidence of Parliament and too many resignations may cause the fall of a Government. The Prime Minister may be described as *primus inter pares* rather than as an autocrat.

Size of Cabinets.

A major problem of government is to secure co-ordination. Cabinets vary in size. They must not be too large for efficient deliberation, and yet they must not exclude those Ministers who are responsible for major spheres of government. Between 1919 and 1939 the usual size of the Cabinet was twenty to twenty-two. A Minister who is interested in a particular topic can always express his views to the Cabinet and, though not a member, be invited to attend particular meetings, but it is not always practicable to say that issues of policy only affect certain departments. A major decision on policy may indirectly affect most aspects of government and in peace time it has been usual to include in the Cabinet all the heads of the major government departments. That this practice has resulted in unwieldy Cabinets is generally agreed. From the start of the Second World War the need for day-to-day decisions demanded a smaller Cabinet.

Cabinet Committees.

The establishment of Cabinet committees at the top and inter-

[1] Pp. 204–5, *post*.

[2] Honours are also granted on the advice of other Ministers, *e.g.* the Secretaries of State for Foreign Affairs and the Colonies, and the heads of the Service departments. Similarly certain appointments are made on the recommendation of other Ministers, *e.g.* judgeships on the recommendation of the Lord Chancellor, recorderships on the recommendation of the Home Secretary.

[3] Jennings, *Cabinet Government*, p. 203.

departmental consultation at all levels has considerably assisted co-ordination. There are many problems which concern more than one department and should be presented to the Cabinet after agreement has been reached or at least after differences have been defined by the departments concerned. It is necessary to distinguish between the Cabinet and its committees, the internal working of which is veiled in secrecy (though the existence of some of the committees has from time to time been made public), and those advisory bodies of which the Committee of Imperial Defence is the outstanding example. The membership of Cabinet Committees is confined to Ministers. Membership of advisory bodies includes high officials and others, but they have, as such, no executive functions.

Committee of Imperial Defence.

The Committee of Imperial Defence was brought into being in May, 1904. It has no executive authority: it only co-ordinates and gives advice.[1] The Committee advises on defence questions; the Cabinet decides; the service departments take the necessary executive action. "This does not mean that it is necessary for every question on which the Committee of Imperial Defence is asked to advise to go subsequently to the Cabinet. In the majority of cases the agreed recommendations of the Committee of Imperial Defence are automatically implemented by the departments concerned on the responsibility and authority of their respective Ministers." [2] The function of the Committee is to frame the fundamental principles that should govern imperial defence and to prepare detailed plans to ensure that all authorities, both at home and abroad, should in the event of war work to a detailed and co-ordinated plan. It is elastic in its composition. The Prime Minister is the President and has absolute discretion as to the selection and variation of its members. It has been the practice for successive Prime Ministers on assuming office to nominate the Ministers and officials whom they wish to serve on what may be called the permanent panel of the Committee of Imperial Defence, and to attend all its meetings without special invitation. The permanent panel in January, 1939, consisted of the Prime Minister, the Minister for Co-ordination of Defence, the Chancellor of the Exchequer, the Home Secretary, the Lord Privy Seal (who was then responsible for Civil Defence); the Secretaries of State for Foreign Affairs, Dominion Affairs, the Colonies and India; the three Service Ministers; the First Sea Lord, the Chief of the Imperial General Staff and the Chief of the Air Staff; the Permanent Secretary to the Treasury

[1] This paragraph is based on a lecture by General Sir Hastings Ismay, Secretary of the Committee of Imperial Defence, reprinted from *R.U.S.I. Journal*, May, 1939. No announcement of the post-war organisation has yet been made.

[2] Ismay, *op. cit.*

and the Secretary to the Cabinet. The Committee of Imperial Defence has a small permanent secretariat. The Dominions are not represented on the permanent panel, but the Dominion High Commissioners in London regularly attend those meetings at which matters of interest to their Governments are down for discussion. In addition to the permanent panel other Ministers, officers of the three Services, and experts of every kind are invited to attend meetings when the problems under discussion call for their particular experience. The detailed work of the Committee of Imperial Defence is done by sub-committees, *e.g.* the Chief of Staffs Sub-Committee of which the Prime Minister is Chairman, though normally the three Chiefs of Staff meet alone; the Joint Planning Sub-Committee,[1] working under the Chiefs of Staff; the Joint Intelligence Sub-Committee which provides intelligence for the Chiefs of Staff and Joint Planners[1]; the Overseas Defence Committee under the chairmanship of the Permanent Under-Secretary of State for the Colonies; the Principal Supply Officers Sub-Committee; the Food Supply Committee. The Committee of Imperial Defence has, since the outbreak of the Second World War, been absorbed in the War Cabinet owing to the necessity of co-ordination and control being exercised by a body having executive authority and able to take immediate decisions on questions involving major policy.

Economic General Staff.

Another advisory committee was the Economic Advisory Council established in 1930 to advise the Cabinet on such economic matters as might be referred to it. It was an advisory body working through sub-committees assisted by experts. Writing in 1936 Dr. Jennings said of it:[2] "While it cannot be said that the experiment has failed, it cannot yet be said that it has succeeded." Its place has now been taken by the Economic Section of the Cabinet Secretariat and the Central Statistical Office, war-time organisations which are to be continued into the post-war period.[3]

Home Affairs Committee.

The function of the Home Affairs Committee of the Cabinet was to consider departmental Bills and to co-ordinate the views of the departments upon them before they were submitted to the Cabinet with a recommendation from the Committee. In addition to Cabinet Ministers concerned it was usually attended by the Law Officers. Civil servants concerned with particular Bills attended meetings, but were not members of the Committee. It also met at the beginning of the session to recommend government business for the session.

Ad hoc Committees.

In addition to standing committees which vary in number from time to time *ad hoc* committees are appointed from time to time to

[1] Sub-Committees of the Chiefs of Staff Sub-Committee.
[2] *Cabinet Government*, p. 249.
[3] See *Post-War Recruitment for the Civil Service*, Cmd. 6597, 1944.

make recommendations on issues involving the interests of separate departments.

The Cabinet Secretariat.

The Cabinet Secretariat was created during the First World War in 1917. "For the first time in the history of the Cabinet a Secretary was present to record the proceedings and keep the minutes of the Cabinet and of its numerous committees, and orderly methods based on those developed by the Committee of Imperial Defence were introduced, including agenda papers, the distribution (in advance of the meetings) of relevant memoranda and other material, the rapid communication of decisions to those who had to act on them; and the knitting up to the Cabinet, not only of government departments, but also of numerous committees combining a vast range of inter-departmental business."[1] The Secretariat is a recording and not an executive, or even an advisory, department. The conclusions prepared by the Secretary to the Cabinet and circulated to the King and all Cabinet Ministers are the only authentic record of Cabinet meetings.

The Problem of Co-ordination.

With the development of the committee system and the creation of the Cabinet Secretariat there had been combined with ministerial responsibility the strong points of the local government system—advisory committees and a recording department serving all the various committees (the office of the clerk to the council).[2] The efficiency of any large organisation depends very largely on proper co-ordination of departmental activities. There must be proper co-operation in both the framing of policy and its execution. Under the Cabinet system such co-operation is secured without impairing the responsibility of the individual Minister for the work of his department.[3] There is scarcely any major problem of government which does not involve the activities of several government departments. Co-ordination is secured through the committee system, of which the Committee of Imperial Defence is an outstandingly successful example. It is by the extension of the committee system that co-ordination may best be improved. We have seen that the recommendations of the Committee of Imperial Defence, though only an advisory body, are in fact implemented by responsible Ministers. An influential committee not only frames policy but by calling for progress reports is able to ensure to a large extent that its policy is carried out. The experience of war may well lead to an increase in the number of standing committees of the Cabinet working through sub-committees with co-opted experts, assisted by the Cabinet Secretariat, and presided over either by the

[1] *Haldane Memorial Lecture*, 1942, by Lord Hankey.

[2] Though the clerk to a council is also an executive officer who himself has responsibility for co-ordination.

[3] Part II., Chap. 4, *ante*.

Minister whose department is most closely concerned, or by one of the Ministers without departmental responsibility, or by different members of the committee in accordance with the notice of the agenda for each meeting.[1]

Organisation for War.

During both the First and Second World Wars it was found necessary to supersede the normal Cabinet by a small War Cabinet to take responsibility for the conduct of the war. The number of the War Cabinet varied from ten to five. In 1944 the War Cabinet consisted of the Prime Minister (also Minister of Defence), the Lord President of the Council (Deputy Prime Minister), the Foreign Secretary (and leader of the House of Commons), the Chancellor of the Exchequer, the Minister of Labour and National Service, the Minister of Production, the Home Secretary, and the Minister of Reconstruction. Other Ministers were invited to attend meetings for the discussion of matters with which their departments were concerned. As in the First World War, when over 250 persons in all were summoned on occasions, other persons than Ministers might be in attendance. In particular visiting Prime Ministers or their deputies from the Dominions and representatives of the Government of India attended from time to time. The Secretariat of the Committee of Imperial Defence was merged in the War Cabinet Secretariat of which the military members constituted the staff of the Prime Minister as Minister of Defence.[2] There had been appointed in 1936 a Minister for Co-ordination of Defence, but this post was abolished in 1940 when Mr. Churchill became Minister of Defence. There was never a Ministry of Defence and the constitutional responsibilities of the three service Ministers remained in those spheres for which the Minister of Defence did not accept responsibility. In his task of supervision of the work of the Chiefs of Staffs Sub-Committee the Prime Minister was assisted by a Defence Committee comprising three members of the War Cabinet, the three Service Ministers, the Chiefs of Staff and the Chief of Combined Operations. To plan for peace there was appointed later in 1943 a Minister of Reconstruction to co-ordinate the activities of the various departments concerned with civil planning. Like the Minister of Defence the Minister of Reconstruction was a Minister without a department.

The time has not yet come to record the elaborate structure of War Cabinet and inter-departmental committees which was responsible for mobilising the resources of the nation. Apart from the organisation under the Minister of Defence the information has not yet been made public, though reference has been made from time to time in Parliament to particular committees.

[1] For the re-grouping of government departments, see p. 151, *post.*

[2] *The Organisation for Joint Planning*, 1942, Cmd. 6351.

CHAPTER 4.

THE CENTRAL GOVERNMENT DEPARTMENTS.

ADMINISTRATIVE government at the centre is carried out mainly by departments. A list of the departments follows, together with a brief statement of their principal functions.[1] No attempt has been made to cover in detail the vast field of activity of the Central Government.

Organisation of Departments.

A department is presided over by a Minister who in the case of all the more important departments has hitherto been, in peace time, a member of the Cabinet. He is assisted by a junior Minister or a Parliamentary Secretary.[2] The Permanent Secretary [3] is the senior civil servant in the department. Under him are one or more Deputy Secretaries and a hierarchy of administrative officers graded as Principal Assistant Secretaries, Assistant Secretaries, Principals and Assistant Principals. It is the administrative staff who are responsible for executing policy and on them, particularly the higher grades, the Minister must be able to rely for disinterested and impartial advice.

Government Departments.

(*a*) *The Treasury.*[4]—The Treasury is the Central Department. Its functions fall into two distinct divisions: (*a*) Finance, (*b*) Supply and Establishments. It is under the second head that the Treasury exercises a predominating influence over the expenditure, and therefore over the policy, of the departments and over the whole Civil Service.

(*b*) *Departments presided over by Secretaries of State.*—Something must be said about the office of Secretary of State. There are now nine Secretaries of State, who preside over some of the more important departments. For all but peers and privy councillors the Secretary of State is the only avenue of approach for the subject to the Sovereign, save by petition. Whereas departments may be approached by direct communication, this is not so in the case of approach to the Sovereign. Similarly, authentic communications by the Sovereign to his people are normally countersigned by a Secretary of State. It is interesting to note that the duties of Secretaries of State are legally interchangeable and independent of

[1] For the Lord President, see p. 123, *ante*. For a fuller account of the functions of the various departments, see Jennings, *op. cit.*, Appendix III. The future of some of the new Ministries created during the Second World War is as yet unknown.

[2] Where the Minister is a Secretary of State, the Parliamentary Secretary is designated Parliamentary Under-Secretary of State. There may be more than one Parliamentary Secretary; see p. 134, *ante*.

[3] Where the Minister is a Secretary of State, the Permanent Secretary is designated Permanent Under-Secretary of State.

[4] Chaps. 5 and 6, *post*.

any distinction on account of the departments over which they preside. In practice each Secretary of State limits his functions to those traditionally related to his own department and many powers are conferred by statute on a particular Secretary of State, *e.g.* on the Secretary of State for War by the Defence Act, 1842.[1] Documents signed by a Secretary of State do not indicate that they are signed by any particular Secretary, the signature being followed by the words " One of His Majesty's Principal Secretaries of State."

History of Secretaryships of State.

The office of Secretary of State springs from a humble origin, and it is not easy to say at what precise moment in history the King's Secretary became a definite office. In the Tudor period the Secretary became a channel of communication for home and foreign affairs, and the office seems to have grown in importance, largely perhaps on account of the personal rule of the Tudors. From about 1540 two Secretaries of State were appointed, but not at first as an invariable practice. It was when the Privy Council sought to combine deliberative and executive functions that the office assumed its present importance. The Secretaries of State ceased in fact, though not in law, to be servants of the King and his Council and became one of the motive forces in the Cabinet. On two occasions before 1782 a third Secretaryship was added for the time being. It was in that year that the Home Office and the Foreign Office came into existence as separate departments. For some 150 years there had been a Secretary of State for the Northern Department, in charge of business relating to the Northern Powers of Europe, and another for the Southern Department, which embraced France and the Southern countries. Ireland fell to the senior Secretary, while the Colonies and Home Affairs came under either.[2] On March 27, 1782, the Foreign Office came into existence as a result of a circular letter addressed by Fox to the representatives of Foreign Powers in London, to the effect that he had been entrusted with the sole direction of foreign affairs, while his colleague, the Earl of Shelburne, had been appointed Principal Secretary of State for Domestic Affairs and the Colonies. The Home Secretary from that date took precedence over all other Secretaries. At that time he had very few of the statutory powers and duties which subsequent legislation has conferred upon him. The other Secretaryships of State may be said to have been created out of this Secretaryship. In 1794 a Secretary of State for War was appointed, who in 1801 took over the Colonies. In 1854 a Secretary of State for the Colonies was

[1] The Act speaks of the " principal officers of the Ordnance," whose powers and duties have been vested in the Secretary of State for War by subsequent enactments.

[2] But compare the account in Anson, *op. cit.* (4th ed.), Vol. II., Part I., pp. 178 ff.

appointed on account of the Crimean War. In 1858, as the result of the Indian Mutiny, Indian affairs were entrusted to a Secretary of State for India. It was not until 1918 that another Secretaryship was created, namely, that for Air. In 1925 the Secretary of State for the Colonies was appointed to a separate Secretaryship for Dominion Affairs, the Colonial Office and the Dominions Office being henceforth organised in separate departments, though the offices were, until 1930, held by the same holder. In 1926 the Secretary for Scotland, who, as head of the Scottish Office, controls much of the internal government of Scotland, assisted by subordinate departments, was given the status of Secretary of State. Consequent on the Government of Burma Act, 1935, a ninth Secretaryship was added which has so far been held by the Secretary of State for India.

The Home Office.—The Home Office is responsible for internal order and for all functions of internal government not assigned to some other department. Its functions include the control of aliens,[1] naturalisation,[2] police regulations for the county and borough police forces,[3] the administration of the Children and Young Persons Acts, and the Shops Acts, the control of the sale of poisons, intoxicating liquors, explosives and firearms, the enforcement of safety regulations for places of public entertainment, and the functions of the United Kingdom Government in relation to Northern Ireland, the Channel Islands and the Isle of Man. The Home Office is the central administrative authority for supervising the registration of electors and the conduct of both parliamentary and local elections. It has certain statutory duties in relation to fire brigades and the war-time National Fire Service was under its direct control. The Home Secretary is the official channel of communication between the Crown and the Church of England, though in regard to Crown appointments to the chief ecclesiastical posts the King is advised by the Prime Minister.[4]

In regard to the administration of justice the Home Secretary shares with the Lord Chancellor[5] and the Law Officers of the Crown[6] a part of those duties which in continental countries would be performed by a Minister of Justice. These duties are discussed in Part V., Chap. 2. The Office is particularly connected with courts of summary jurisdiction. It is by statute placed in control of the Prison Commission and the Metropolitan Police.

The Foreign Office.—The Secretary of State for Foreign Affairs is responsible for foreign affairs and relations with Foreign States. The powers of the Crown in this sphere are prerogative powers and, while the Foreign Secretary is primarily responsible for their exercise,

[1] Pp. 171–2, *post.* [2] Pp. 167–70, *post.* [3] Pp. 163–5, *post.*
[4] Crown livings are mainly in the gift of the Lord Chancellor.
[5] P. 213, *post.* [6] P. 150, *post.*

they are, like all prerogative powers, exercised subject to the collective responsibility of the Cabinet as a whole to which all major decisions are referred. The Foreign Office controls His Majesty's Foreign Service created in 1943 by the amalgamation by Order in Council into one service of the staffs of the Foreign Office and Diplomatic Service, the Commercial Diplomatic Service and the Consular Service. The Foreign Office is responsible for the affairs of the Anglo-Egyptian Sudan (jointly governed by Egypt and the United Kingdom) and for the exercise by the Crown of foreign jurisdiction [1] in territories falling outside the spheres of the Colonial, Dominions and India Offices.

The Dominions Office.—This department was organised as a separate office in 1925. Until 1930 it remained under the same Secretary of State as the Colonial Office. It is concerned with the relations between the Mother Country and the Self-governing Dominions, Southern Rhodesia, Basutoland and the Protectorates of Bechuanaland and Swaziland. The last three territories are administered by a High Commissioner who also holds the independent office of High Commissioner of the United Kingdom Government in the Union of South Africa.[2]

The Colonial Office.—This department deals with all the Colonies, the protectorates other than the territories administered by the High Commissioner in South Africa (*ante*), and the mandated territories. It is responsible for so much of colonial legislation as is enacted by Orders in Council, and exercises a wide patronage over appointments in the Colonial Service.[3]

The War Office.[4]

The India Office.—The Secretary of State for India is responsible for the government of British India in so far as it is dealt with in this country, as well as for the relationship between the King-Emperor and the Indian Native States.[5]

The Scottish Office.—The Secretary of State for Scotland is responsible (with some exceptions) so far as Scotland is concerned for all the functions which in England and Wales are discharged by the Home Secretary, the Minister of Agriculture and Fisheries, the Minister of Health and the Minister of Education. He has in addition duties corresponding to some of those of the Lord Chancellor. He is also the mouthpiece of Scottish opinion in the Cabinet and elsewhere. His office is discharged through four main departments of equal status each under a permanent Secretary—the Department of Agriculture for Scotland, the Scottish Education Department,

[1] P. 369, *post.*
[2] P. 368, *post.*
[3] Part X., Chap. 2.
[4] For the three Service Departments, see pp. 148–9, *post.*
[5] Part X., Chap. 4.

the Department of Health for Scotland and the Scottish Home Department. The day-to-day administration of these departments is conducted from Edinburgh and the London office of the Scottish Office is mainly a parliamentary and liaison office. It may be said that the Scottish Office is responsible for all functions of government relating to Scotland which can be handled on a geographical basis. Economic functions, *e.g.* those of the Board of Trade, and defence are administered by a United Kingdom Minister.

The Air Ministry.[1]

(*c*) *Departments presided over by other Ministers usually of Cabinet rank.*

The Admiralty.[1]

The Board of Trade.—The Board, still in form a Committee of the Privy Council for Trade and the Plantations constituted by an Order in Council in 1786, consists of a body of permanent commissioners. The President is the ministerial head and the Board never meets in its corporate capacity, but acts through the President or some officer designated by him. Its functions are (*a*) to study movements and development of trade and advise on national commercial and industrial policy, (*b*) to exercise statutory and other regulative functions relating to trade and industrial matters; the coastguards;[2] and administrative matters relating to bankruptcy, the winding-up of companies, and patents. The Department of Overseas Trade under a Parliamentary Secretary is a subordinate department to the Board of Trade and Foreign Office jointly.

The Ministry of Health.[3]—This department is responsible for the general relations between the Central Government and the local authorities. It supervises the work of local authorities in relation to health, housing, public assistance and all services not falling within the sphere of some other department (*e.g.* roads which come under the Minister of Transport). It will be responsible for the proposed National Health Service.

The Ministry of Education.—This ministry is responsible for national policy in relation to education and the administration of national education both primary and secondary. It controls the educational services administered by local authorities.

The Ministry of Agriculture and Fisheries.—Except that the Minister is also responsible for the Ordnance Survey and, jointly with the Secretary of State for Scotland, for Forestry, the name sufficiently explains the functions of the department. The Commissioners of Crown Lands are a body corporate charged with the management of land held by right of the Crown; the Minister of Agriculture and Fisheries is First Commissioner.

[1] For the three Service Departments, see pp. 148–9, *post.*
[2] P. 149, *post.* [3] See also Part VI.

The Ministry of Labour.[1]—This department is responsible for all questions relating to conditions of labour and employment. During the Second World War it administered all regulations relating to compulsory national service.

The Post Office.—To this department is entrusted a State monopoly of the postal and tele-communication services of the country. Inasmuch as there are post offices throughout the country, the Post Office is utilised for many government services which involve local dealings with the public, but yet remain under central control. Among these may be mentioned the issue of licences, the collection of certain taxes, the payment of old age, widows', orphans' and other civil pensions and of service allowances, the sale of insurance stamps, the issue of savings certificates and the conduct of a savings bank business. The British Broadcasting Corporation is administered under Royal Charter, which gives it a quasi-independent status, by a body of Governors, but the Postmaster-General replies to questions in Parliament relating to its administration.

The Ministry of Transport.[2]—It is the task of this department to regulate and improve the means of locomotion and transport. On its creation in 1919 there were transferred from the Board of Trade the regulative powers relating to railways, canals, roads and harbours. Its exercise of powers under the Road Traffic Acts, 1930–34, is among its more important functions. During the Second World War there were transferred to this department the functions of the Board of Trade in relation to the mercantile marine which had in 1939 been transferred to the newly created Ministry of Shipping.

The Ministry of Pensions.—This Ministry administers a scheme of disablement and dependants' pensions arising out of casualties of the First and Second World Wars.

Ministry of National Insurance.—This department was established by the Ministry of National Insurance Act, 1944, to administer all forms of national insurance, *i.e.* national health insurance,[3] unemployment insurance,[4] and industrial injury insurance [5] (workmen's compensation).

Ministry of Town and Country Planning.—This department was established by the Minister of Town and Country Planning Act, 1943. By the Minister of Works and Planning Act, 1942, there were transferred to the Minister of Works and Planning the functions of the Minister of Health under the Town and Country Planning Acts. In 1943 town and country planning functions were

[1] During the Second World War entitled Ministry of Labour and National Service.
[2] During the Second World War entitled Ministry of War Transport.
[3] Formerly the responsibility of the Minister of Health.
[4] Formerly the responsibility of the Minister of Labour.
[5] Formerly the responsibility of the Home Secretary.

transferred to a new Minister of Town and Country Planning and the Minister of Works and Planning became Minister of Works.

Ministry of Supply.—This department was created in July 1939 by the Ministry of Supply Act, 1939. The Act is a permanent Act, but it is uncertain whether the Ministry of Supply will continue in peace time. The primary function of the department is to provide supplies for the Army either by purchase or manufacture. It has also administered the war-time controls of raw materials. The Admiralty is its own supply department and technical supplies for the Air Force are the responsibility of the Ministry of Aircraft Production.

The Ministry of Works.—This department provides buildings throughout the country to house government departments and is responsible for repair and maintenance. It is also entrusted with the care of royal palaces and royal parks.[1]

The Ministry of Fuel and Power.—This department was constituted as a war-time Ministry in 1942 by the transfer of the functions of the Board of Trade and Ministry of Transport in relation to mines, gas and electricity undertakings. One of the two Parliamentary Secretaries is in charge of the Petroleum Department, which was previously under the Board of Trade. The department was made permanent in 1945.

The Ministry of Civil Aviation.—In 1944 a Minister of Civil Aviation was appointed to take charge of the functions of the Air Ministry relating to civil aviation. The separate department was constituted by statute in 1945.

(*d*) *The Service Departments.*

The three Service Ministries are like other departments presided over by Ministers responsible to Parliament; the First Lord of the Admiralty, the Secretary of State for War and the Secretary of State for Air. Each Service is, however, directed by a board or council composed, partly of experts, partly by civilians over which the responsible Minister presides. There are thus combined ministerial responsibility and expert direction. The responsible Minister may override his colleagues.

The Admiralty.—The Board of Admiralty are Commissioners for executing the office of Lord High Admiral. The Board consists of the First Lord of the Admiralty, several naval experts (including the Five Sea Lords and Vice-Chief of Naval Staff), the Parliamentary Secretary to the Admiralty, the Financial Secretary to the Admiralty, the Civil Lord and the Permanent Secretary to the Admiralty. The Parliamentary and Financial Secretaries and Civil Lord are members of Parliament. The Permanent Secretary is the chief civil servant in the Admiralty.

[1] Since 1940 it has also been given important powers in relation to building and the building industry.

The War Office.—The Secretary of State for War presides over the Army Council which controls the Army as the Board of Admiralty controls the Navy. The Army Council is composed of military members, including the Chief, Vice-Chief and Deputy Chief of the Imperial General Staff, the Adjutant-General to the Forces, and the Quarter-Master General to the Forces, and five civilian members: the Secretary of State, the two Parliamentary Secretaries (the Parliamentary Under-Secretary of State and the Financial Secretary) and the Joint Permanent Under-Secretaries of State (civil servants).

The Air Ministry.—The Secretary of State for Air presides over the Air Council similarly constituted to the Army Council. It consists of service members, including the Chief of the Air Staff, and three civilian members, the Secretary of State and the Parliamentary and Permanent Under-Secretaries of State for Air.

The administration and organisation of the Territorial Army[1] is under the general direction of the Army Council assigned to county associations presided over by the Lord-Lieutenant of each county.

The Meteorological Service comes under the Air Ministry. The Coastguard Service is under the Board of Trade, but may be taken over by the Admiralty in an emergency when officers and men become subject to the Naval Discipline Acts.

The Lord Chancellor.—The office of Lord Chancellor has hitherto carried Cabinet rank (though not membership of a War Cabinet). The Lord Chancellor is Speaker of the House of Lords,[2] and has the custody of the Great Seal. He presides as a judge over the two highest courts in the realm, the House of Lords and the Judicial Committee of the Privy Council. His duties in connection with judicial appointments and the general administration of justice will be discussed in Part V., Chap. 2. The Lord Chancellor is responsible for the Land Registry and Public Trustee Office. Despite its judicial nature the office has remained political in that it is held by an eminent member of the Bench or Bar adhering to the party in office.

Lord Privy Seal.—The duties of this office have been abolished by statute. The holder usually sits in the Cabinet without specific departmental duties.

Chancellor of the Duchy of Lancaster.—Apart from patronage this ministerial office, on occasions of Cabinet rank, is virtually a sinecure office. The revenues of the Duchy belong to the Sovereign as Duke of Lancaster. The Vice-Chancellor is judge of the Palatine Court of Chancery.

The Law Officers' Department.—Although all government departments either have departmental solicitors or use the services of the Treasury Solicitor[3] and some departments have a staff of legal

[1] P. 342, *post.* [2] P. 88, *ante.* [3] P. 154, *post.*

advisers, the Law Officers of the Crown, the Attorney-General and Solicitor-General, represent the Crown in courts of justice, act as legal advisers to government departments on more important matters and represent them in court. They are assisted by Junior Counsel to the Treasury. As representing the Crown, the Attorney-General and Solicitor-General take part in many judicial or quasi-judicial proceedings relating to the public interest, such as proceedings relating to the administration of charities and income tax. The appointments are political and are conferred on successful barristers who are supporters of the party in power. The Attorney-General has sometimes been a member of the Cabinet, but in view of his duties in connection with prosecutions [1] it is generally regarded as preferable that he should remain outside the Cabinet as the Government's chief legal adviser. In addition to the salaries of their offices the Law Officers draw substantial sums in fees for Crown litigation, though private practice is prohibited. They are accordingly more highly remunerated than other Ministers of the Crown, and advancement to judicial or political office is more or less assured to the holders of either appointment. The Attorney-General is the head of the English Bar. The Dean of the Faculty of Advocates is head of the Scots Bar. The Lord Advocate and the Solicitor-General for Scotland are the Law Officers for Scotland.

Certain duties are by statute imposed upon the Attorney-General or the Lord Advocate. In the event of absence or illness or with special authority these duties may be carried out by the Solicitor-General or Solicitor-General for Scotland.[2]

Minor Departments.—There are in addition a number of minor departments, mainly of the non-political type, *e.g.* the Public Trustee, the Land Registry, the Paymaster-General's Office,[3] the Stationery Office,[4] the Charity Commissioners and the Public Record Office. Offices of State connected with the Royal Household, such as the Lord Chamberlain, the Keeper of the Privy Purse and the Master of the Horse, are in part under the patronage of the Government, and partly personal appointments by the Sovereign.

War-time Ministries.

Several Ministries were created during the Second World War under the Ministers of the Crown (Emergency) Appointments Act, 1939,[5] which made provision for the appointment of Ministers for the purpose of the prosecution of war and for the transfer of function to such Ministers from other departments. The Minister of Labour became also Minister of National Service. The Home Secretary

[1] Part V, Chap. 2. [2] Law Officers Act, 1944.

[3] The Paymaster-General is a Minister.

[4] The Chancellor of the Exchequer is the Minister responsible for this office. See also for other subordinate departments connected with the Treasury, pp. 155–6, *post.*

[5] P. 134, *ante.*

became also Minister of Home Security with a separate Parliamentary Secretary and staff constituting the Ministry of Home Security. The Minister of Transport became Minister of War Transport with control of all land and sea transport.[1] There were created also the Ministry of Aircraft Production to carry out the supply functions of the Air Ministry, the Ministry of Food, the Ministry of Economic Warfare, the Ministry of Information and the Ministry of Fuel and Power which became a permanent department in 1945. The Ministry of Production was created to co-ordinate the requirements of the various supply departments and the Minister of Production was a member of the War Cabinet. In 1942 there was appointed a Minister of Reconstruction [2] without a separate Ministry, to co-ordinate plans for post-war reconstruction. The Secretary of State for Foreign Affairs who has been since 1942 also Leader of the House of Commons is assisted by a Minister of State. Ministers Resident [2] were appointed to various posts abroad, *e.g.* the Middle East, the Mediterranean, West Africa, and (for supply purposes) in Washington.

Co-ordination of work of Government.

It has been a source of criticism by many that the departments of the Central Government are so organised that no one department may be entirely responsible for the administrative action required by a pressing problem calling for the intervention of the Government. Moreover, the efficiency of ordinary routine administration may suffer from divided control or may be overlapping. In 1918 the Machinery of Government Committee, over which Lord Haldane presided, recommended that the business of the various departments should be distributed into ten main divisions and emphasised the necessity for co-operation between departments, dealing with matters of common interest:—

I. Finance.
II. and III. National Defence and External Affairs.
IV. Research and Information.
V. Production, Transport and Commerce.
VI. Employment.
VII. Supplies.
VIII. Education.
IX. Health.
X. Justice.

It did not, in the opinion of the Committee, necessarily follow that there would be only one Minister for each of these branches. Some would undoubtedly require more than one.

[1] There was then abolished the Ministry of Shipping created in October, 1939.
[2] These appointments were not made under the Ministers of the Crown (Emergency Appointments) Act, 1939.

CHAPTER 5.

THE CIVIL SERVICE.

THE departments are staffed by administrative, professional, technical, executive and clerical officers who constitute the Civil Service.

What is a Civil Servant?

Civil servants are all servants of the Crown. There is no comprehensive definition of a Crown servant.[1] A person appointed by another Crown servant under the authority of a statute may be a Crown servant as much as one appointed directly by the Crown. The facts of each appointment must be considered.[2]

The Civil Service.

There are various grades in the service. Not all the civilian employees of the Crown are in the " established " service; some appointments are temporary; others " non-established " and therefore non-pensionable. There were before the Second World War about 400,000 non-industrial civil servants, including over 200,000 Post Office employees. By 1945 the total was 716,000, together with 675,000 industrial employees (240,000 in 1939). The Administrative Class (1,480 in 1938) forms the highest grade of permanent officials and by them all important decisions, except on matters of policy which are decided by a Minister or the Cabinet as a whole, are taken.

Organisation within Departments.

The work of a department is usually carried out under divisions or branches, each in charge of a senior administrative officer, assisted by administrative, executive and clerical officers. The nature of a department's functions will determine the range of professional and technical officers employed. Scientific advisers are found in many departments. The professional staffs, lawyers apart, are determined by the nature of the public service for which the department is responsible. For example, the Ministry of Health naturally employs a large staff of medical men; the Ministry of Education contains an inspectorate of schools. It is to be observed that the professional and technical staffs are not directly concerned with the formulation of policy. Accordingly they occupy in the civil service hierarchy a status inferior to their equivalent in rank in the administrative grade, which is reflected not only in their salaries, but in the extent to which their services

[1] In the Trade Disputes and Trade Union Act, 1927, s. 5, an established civil servant is defined as " a person serving as an established civil servant in the permanent service of the Crown."

[2] N. E. Mustoe, *Law and Organization of the British Civil Service* (Pitman), Chap. I.

are made use of in matters closely related to their specialised knowledge. It is a subject of criticism that, especially in scientific matters, the civil departments have no body equivalent to the Army Council or Board of Admiralty, where professional opinion is represented at the highest level. In defence of the present system it may be argued that the specialist may take too narrow a view and that the administrator is more capable of interpreting specialised knowledge in its application to national policy. It is, however, doubtful whether under modern conditions the administrator is capable of sustaining the burden which is placed upon him by the complexity of the issues, where specialised knowledge is required in the formation of a judgment.

Tenure of Appointment.

The Civil Service in its present form, though its numbers have increased with the advent of social and other State services, dates from 1855, when patronage as a mode of recruitment for the administrative and executive classes was replaced by entry through competitive examinations of a general character. Professional and technical officers are recruited by special examination or by selection by Boards after an interview. Appointments are normally terminable at the pleasure of the Crown and the conditions of employment are regulated by Orders in Council under which the Civil Service Commission conducts the entrance examinations under regulations made by itself and approved by the Treasury. As we have seen, a servant of the Crown may be dismissed at pleasure and has no remedy, but his tenure is in fact permanent. A person who holds a pensionable post is only dismissed for misconduct and then there are safeguards for his protection. Salaries, if not expressly provided by statute, as in the case of a few of the higher appointments, are regulated by the Treasury or fixed by Order in Council. Only the total sums required for payment of salaries appear in the annual estimates of the departments laid before Parliament. Pensions and superannuation payments are authorised by statute, but no recourse can be had to the courts to enforce payment of pensions, or to afford a remedy for wrongful dismissal either against the Crown, the Treasury, or the head of the department concerned. Civil servants are not in the employment of their departments, all being equally, from the highest to the lowest, in the service of the Crown.

Law of the Civil Service.

The law of the Civil Service is contained in the Orders in Council and regulations made thereunder and in Treasury circulars or minutes addressed to the permanent heads of departments. There is an appeal against dismissal to the head of the department. Negotiations as to conditions of service are in the lower grades conducted through Whitley Councils and arbitration in Industrial Courts; but the Treasury retains final control and embodies the

agreements or awards in Treasury circulars. Civil servants are not allowed to be members of trade unions which are affiliated to similar organisations outside the service.[1]

Treasury as Central Department.

Each major department is separate, but for the general control of the Civil Service the Treasury acts as a central department and controls the general organisation and conditions of the Civil Service through its Establishments division under the authority of the First Lord of the Treasury. The Permanent Secretary to the Treasury is head of the Civil Service and advises the Prime Minister on those higher appointments [2] which require his consent. The Establishments division of the Treasury secures uniformity and advises departmental establishment officers. The number and salaries of each category of departmental officers require Treasury approval. Treasury circulars or minutes are also sometimes issued on matters of discipline and other matters where uniformity of practice between departments is essential.[3] The Civil Service Commission is a subordinate department of the Treasury.[4]

[1] Trade Disputes and Trade Union Act, 1927, s. 5.

[2] P. 137, *ante*.

[3] Royal Commission on the Civil Service (1929), *Minutes of Evidence*, Appendix I., p. 27, cited W. I. Jennings, *Cabinet Government*, p. 117.

[4] The position of the Treasury as a central department is strengthened by its control over Parliamentary Counsel to the Treasury, who draft bills for all departments, and over the Treasury Solicitor, who conducts all Crown litigation.

CHAPTER 6.

PUBLIC FINANCE.[1]

IN this Chapter there will be considered the manner of raising and spending the national revenue with particular reference to the practices of the Treasury. Parliamentary control of expenditure and taxation has already been described in Part III., Chap. 3, and in Chap. 5 of this Part there have been mentioned the functions of the Treasury as the central department of the Civil Service.

Treasury Board.

The office of Treasurer was first put into commission in 1616. Since 1714 it has always been in commission. The Treasury Board, as are the Commissioners for executing the office of the Lord High Admiral, *i.e.* the Admiralty, is a body of Commissioners. The Board is created by letters patent under the Great Seal and is composed of a number of individuals appointed by name. In practice they are the First Lord of the Treasury (an office normally taken by the Prime Minister), the Chancellor of the Exchequer (Under Treasurer) and the Assistant Government Whips (Junior Lords of the Treasury).[2]

The Board never meets, individual members being responsible for the business transacted. Treasury warrants are generally signed by two of the Junior Lords. The Chancellor of the Exchequer is the Finance Minister, not by virtue of his membership of the Board, but by separate patents of office. He is invariably a member of the House of Commons.

Before discussing the part played by the Treasury in revenue matters, it is necessary to give a brief account of the public offices which work in connection with the Treasury.

The Board of Customs and Excise and the Board of Inland Revenue.

(1) The department charged with responsibility for the collection of customs and excise duties is the Board of Customs and Excise, while direct taxation, such as income tax, sur-tax, death duties and stamp duties, are the responsibility of the Board of Inland Revenue. These subordinate departments are placed by statute under Treasury direction.

Comptroller and Auditor-General.

(2) In addition to the important function of auditing public accounts, the Comptroller and Auditor-General can alone authorise

[1] See generally Hills and Fellowes, *The Finance of Government*, 2nd ed., and *The Treasury* (The Whitehall Series), and for the history of the Exchequer and the office of Treasurer, see Anson, *op. cit.* (4th ed.), Vol. II., Part II., pp. 172 ff.

[2] For the duties of the Whips, see Ilbert, *Parliament*, p. 151. Certain posts in the Royal Household are political appointments and their holders act as additional Whips if in the House of Commons, or assist in government business in the House of Lords.

the Bank of England to give credit to the Treasury for payments out of the Consolidated Fund, which is the account at the Bank of England through which all the public revenue passes. He will only give this authority when satisfied that the requirements of the Treasury have been sanctioned by Parliament. As auditor of the public accounts, this officer examines the accounts of departments annually to ensure that public money is spent for the purpose for which it was voted and reports to a standing committee of fifteen members of the House of Commons, called the Public Accounts Committee, which, in turn, makes its report to the House. The report, though not debated by the Commons, assists control by the Treasury. The Comptroller draws attention to any excess of authorised expenditure, as well as to unnecessarily extravagant or irregular items in the accounts of a department. The importance of this office is such that the salary attached to it is not subject to the annual vote of Parliament, but is charged on the Consolidated Fund by an Act which does not require annual renewal. In this respect the Comptroller and Auditor-General is in the same position as the Supreme Court judges, and, like the judges, he holds his office during good behaviour, but can be dismissed by the King upon an address presented by both Houses of Parliament.[1]

Paymaster-General.

(3) The office of Paymaster-General is a political one. Payments on account of the public services are made to the Paymaster-General by the Bank of England, and he pays out the money to the departments and other persons authorised by the Treasury.

There may also be mentioned the Royal Mint, responsible for coinage, and the Public Works Loan Board, which advances money to local authorities for the purpose of authorised capital expenditure.

Functions of Treasury.

The main functions of the Treasury in relation to public finance are threefold:

(1) To consider the financial policy of the Government, and in particular to examine the implications of any new proposal involving, as most proposals do, a charge on the public funds.

(2) To ensure that no more money is asked for by the spending departments than is required for their annual needs.

(3) To check the expenditure of the departments, so that no more money is spent than is authorised by Parliament.

The whole of the national revenue is the King's revenue, but the raising and spending of the King's revenue is subject to the control of the House of Commons. This, in the first place, means that, with unimportant exceptions, the Crown cannot raise any money except by the authority of an Act of Parliament. Secondly, public money cannot be expended without the consent of Parliament, and it is the

[1] See especially Emden, *Principles of British Constitutional Law* (Methuen), pp. 99 ff.

rule of the House of Commons to appropriate revenue to specific purposes of departmental expenditure (Supply). The procedure in relation to Supply Bills has already been dealt with in Part III, where some comment will be found on the ineffectiveness of parliamentary control so far as securing economy of expenditure is concerned.[1]

It has long been provided by Standing Orders of the House of Commons that no charge can be placed upon the public revenue except on the recommendation of the Crown signified by a Minister. The same rule prevails with regard to taxation. A private member may move to reduce a tax, but not to increase it. Thus the Government of the day is responsible for all taxation and expenditure, and no private member can propose that the public funds be utilised for any public purpose that is not approved by the Government.

Consolidated Fund.

All the revenue collected for the National Exchequer is paid into the Consolidated Fund, and all payments for national purposes come out of this fund. In calculating its supply requirements for the forthcoming year a department has to show in its estimates the amount expected as departmental receipts (appropriations-in-aid).[2] These will reduce the amount of the department's total of supply money to be voted by Parliament out of the Consolidated Fund. But like votes of supply, appropriations-in-aid must receive parliamentary sanction in the annual Appropriation Act, and if the estimate of receipts under this head are exceeded, the surplus is surrendered to the Exchequer. A private member may not move in Committee of Supply to reduce an appropriation-in-aid.

Expenditure: Consolidated Fund Services.

The expenditure of the country is grouped under two heads, namely, Consolidated Fund Services and Supply Services. The Consolidated Fund Services are payments under statutes which make a recurrent grant, either for a fixed number of years or without limitation of time. Payments on account of the Supply Services have to be voted each year by the House of Commons. The principal item of expenditure under the heading, Consolidated Fund Services, is the interest upon, and management of, the National Debt. It is obvious that credit which depended for its security on annual review by Parliament would not prove attractive to lenders. Accordingly government loans are charged under statutes which give permanent authority for meeting the obligations incurred to lenders. The National Debt is in normal times reduced by application of (*a*) any surplus of national income over expenditure (the Old Sinking Fund), and (*b*) any saving in the amount provided for interest (the New Sinking Fund).

Civil List.

The King's Civil List was granted to the King by the Civil List Act, 1937, for his reign and six months after, and accordingly is a

[1] Part III., Chap. 3. [2] P. 103, *ante*.

Consolidated Fund Service.[1] The Civil List is the annual income granted to the Sovereign to provide his privy purse and household expenses. It is granted at the beginning of each reign in lieu of the ancient hereditary revenues, including the income from Crown lands, which are on each occasion first surrendered to Parliament by the Crown. The present amount of the Civil List is £410,000. Although a system of appropriations, under which parliamentary grants of supplies were assigned for specific purposes, was adopted for general use from 1689 onwards, many items of public expenditure continued to be met out of the hereditary, life and other revenues of the Crown and thus escaped parliamentary control. By 1830 the Civil List had been cut down to the personal requirements of the Sovereign, and other public expenditure came under the control of Parliament. The Act of 1937 also made provision for annuities to other members of the Royal family.

The sum of £2,500 per annum is charged upon the Consolidated Fund by the Act for Civil List pensions awarded each year to distinguished persons or their dependants who are in poor financial circumstances, but despite the name these pensions have nothing to do with the Civil List.

Salaries charged on Consolidated Fund.

The salaries of those officials whom it is desired to make more independent of parliamentary control than the ordinary departmental officials are also made by statute Consolidated Fund payments. Whereas the total amount needed for salaries by each government department comes under annual review by Parliament, the salaries of the Lord Chancellor (as a judge),[2] the Speaker of the House of Commons, the Comptroller and Auditor-General, the Lords of Appeal in Ordinary, the judges of the Court of Appeal, the High Court of Justice and the County Court are charged on the Consolidated Fund. There is thus no special opportunity of criticising in Parliament each year the work of these officers, as in the case of those who are paid from the Supply Services, and this practice tends purposely to preserve their independent position.[3]

Supply Services.

The Supply Services, as we have seen,[4] fall under three main heads, the Armed Forces of the Crown, the Civil Services and the Revenue Services. The financial year runs from April 1 to March 31, except for the purposes of income tax and surtax, when

[1] For history of Civil List, see Anson, *op. cit.* (4th ed.), Vol. II., Part II., pp. 195 ff. The Act of 1937 is complicated by the fact that King George VI., having no son, is entitled to the revenues of the Duchy of Cornwall, which are normally enjoyed by the eldest son of the Sovereign. Provision is, therefore, made for the event of a Duke of Cornwall being entitled to the Duchy revenues.

[2] Part of the salary is charged to the House of Lords Offices Vote.

[3] The salaries of members of the Assistance Board are charged on the Consolidated Fund. See p. 189, *post.*

[4] Part III., Chap. 3, B.

the period is April 6 to April 5. Each year in the autumn the government departments submit to the Treasury an estimate of their expenditure for the ensuing year. Each estimate is closely scrutinised by the Treasury and cannot be submitted to the House of Commons until it has received Treasury approval. In this way the Treasury is able to a limited extent to check a tendency to extravagance on the part of the spending departments. No doubt a strong Chancellor of the Exchequer can make administration as economical as possible. But it must be remembered that the Treasury must assist in carrying out the policy of the Cabinet. Successive Cabinets, by introducing legislation which involves expanding expenditure are really responsible for increasing expenditure. Policy is apt to be synonymous with expenditure, and therefore the opportunities for the Treasury to curtail expenditure are largely confined to curtailing the expenses of administration. If, for example, the Cabinet as a whole decides to increase the unemployment benefit by statutory amendment, the estimates of the Ministry of Labour, when submitted to the Treasury, must show the increase resulting from the extended benefit. The Treasury may insist that the administrative expenses be restricted—and Treasury control is in this sphere effective—but it has no control whatever over the statutory rate of benefit, once it is approved by Parliament. A strong Chancellor of the Exchequer may, however, as a member of the Cabinet, use his influence with his colleagues by indicating that he is unable to find the money to carry their proposed policy into effect. In the past this has been effective to curtail expenditure on the fighting services, none of which is incurred on the authority of permanent Acts.

Treasury Sanction.

No proposal involving the expenditure of public funds is nowadays presented to the Cabinet until it has been examined both by the Treasury and any other department which may be concerned with the proposal. Indeed all proposals involving an increase in departmental expenditure on any new service require Treasury sanction.[1] Thus the financial implication of any policy which it is proposed to put into effect is ensured full examination.

Estimates.

An annual examination of the estimates by the Treasury also enables the Chancellor of the Exchequer to prepare the annual Budget statement in time for presentation to the House of Commons early in the new financial year.[2] An examination of the estimates can alone enable the Chancellor of the Exchequer and his advisers to determine whether or not additional taxation will have to be imposed, or again, whether the requirements of the ensuing year will enable him to remit some portion of the existing taxation.

[1] For Treasury control, see W. I. Jennings, *Cabinet Government*, Chap. VII.
[2] Part III., Chap. 3, B.

Decline in Treasury Control.

The decline in Treasury control which is due to the causes described has important results. The Treasury (or indeed the department concerned) is debarred from financial control over a new State service, once the measure initiating it has been placed upon the statute book. No alteration of policy is possible, except by the inelastic method of repealing or amending Acts, and a Government will seldom risk the unpopularity of a reversal of policy which would deprive the electors of an established service. The control exercised over the estimates by the House of Commons has long ceased to be more than formal. It is idle to maintain that there is any safeguard in the rule that there shall be no expenditure of public funds without the sanction of the House of Commons, so long as that House itself sets the pace by passing legislation which involves automatic increases in expenditure. Treasury control is thus ineffective in relation to those departments which are committed to fixed statutory charges.[1]

Revenue: Ordinary Revenue

The revenue of the Crown is divided into ordinary and extraordinary, the latter being derived mainly from taxation. The principal item of " ordinary " revenue is the income derived from Crown lands, which in the main have long since been surrendered to the public. The net rents and profits so derived are paid into the Consolidated Fund. The Crown is also, as part of its " ordinary " revenue, entitled to property found without any apparent owner. The most important illustration of this is the property of an intestate who dies without a spouse or blood-relations entitled to take under the Administration of Estates Act, 1925, ss. 46 and 47.

Extraordinary Revenue.

The " extraordinary " revenue derived from taxation falls under several heads. The greater part of the sum raised annually by taxation is imposed by provisions in Finance Acts which do not require renewal, but stand until repealed or amended. The rate of income tax is, however, fixed each year.

Indirect Taxation.

The following are the most important items of indirect taxation, *i.e.* taxation which is, generally speaking, capable of being passed on to the consumer by the taxpayer.

Customs Duties.

(1) Customs duties are levied upon commodities imported into this country from other countries. Preferential rates are granted to Dominion, Indian and Colonial products. With the abandonment of free trade in 1931, there was employed a novel and striking form of delegated legislation for controlling this mode of taxation; see Import Duties Act, 1932.[2]

The Customs Consolidation Act, 1876, contains a code of regulations and imposes penalties upon those who attempt to evade the

[1] No attempt is made here to discuss the functions of the Treasury in relation to war-time expenditure, nor to forecast post-war conditions.

[2] Pp. 94–5, *ante*.

duties. Dutiable goods may only be imported free of duty if they are deposited in a warehouse, the owner of which has entered into a bond with the Crown that the proper duties will be paid if, and when, the goods are released for sale at home. The provision of bonded warehouses is particularly useful for enabling goods intended for re-exportation to other countries to escape duty.

Excise Duties.

(2) Excise duties are imposed upon commodities produced for consumption in this country. The revenue officials have important powers of entry and search to check evasion of the tax, which largely consists of duties on alcoholic liquors. The term, excise duty, is not used strictly in the sense of a tax on commodities, but also covers a number of taxes in the form of licences to manufacture certain articles, *e.g.* beer and spirits ; licences to carry on certain occupations, *e.g.* pawnbroker, money-lender, auctioneer, and retailer of beer, spirits, wine and tobacco ; and licences to use certain articles, *e.g.* for keeping a dog, or driving a motor-car. Another excise duty is the duty on entertainments.

Drawback.

As an equivalent to the bonded warehouse in the case of imported goods, excise duties in the strict sense are generally subject to drawback, *i.e.* repayment of the duty if the goods are exported to a foreign country. The exporter of beer is allowed a drawback on the excise duties paid on the manufacture. The object is to enable British manufacturers to compete in foreign markets with foreigners who may not have had to pay duties on the same commodities. In the case of a customs duty on an article in the raw state, which is imported into this country for manufacture and then re-exported in the finished form, the manufacturer can claim repayment of the customs duties paid on importation. Tobacco to be manufactured into cigarettes for exportation is an example of this.

Direct Taxation.

A direct tax is one which falls on the actual person who pays the tax.

Death Duties.

(3) Certain duties become payable to the Crown on the death of an individual leaving property the value of which exceeds £100. The duties are paid both upon the property which the deceased enjoyed and upon the interests to which others succeed on account of his death. The duties are known as estate duty, succession duty, and legacy duty. Estate duty is payable by the personal representatives on all the property of the deceased whether land, money or goods, while succession duty is payable by those entitled in respect of succession to the land of the deceased or to investments previously settled. Legacy duty is payable by the successor on account of personal property accruing to him by will or intestacy or a gift made in contemplation of death.

Stamp Duties.

(4) Stamp duties are levied upon certain legal instruments, such as instruments of transfer of land or stock and shares.

Income Tax and Sur-tax.

(5) By the Income Tax Act, 1918, income is treated as falling under five heads, called schedules, for the purpose of assessment to tax. In general income tax is levied on all income arising in the United Kingdom and on the income of residents in the United Kingdom wherever it arises.

There is a standard flat rate of income tax, but there are important allowances and deductions which have the effect of making income tax a graduated tax. These allowances are applied to the income both of individuals and of trading and other corporate bodies.

Sur-tax, an additional tax, is a graduated tax on individual incomes above a certain figure. At present the tax is levied on the excess of income over £2,000, the rates rising with the amount of such excess.

Administration of Income Tax.

From a constitutional point of view something must be said about the administration of these taxes. The Commissioners of Inland Revenue are charged with the general management of the taxes and represent the interests of the Crown, *i.e.* the general body of taxpayers. The duties of the Commissioners in each district (the civil parish is the normal unit) are carried out by Inspectors, whose areas cover a number of adjoining districts. Inspectors are civil servants with an expert knowledge of tax law who are responsible for details concerning assessments and for dealing with claims and allowances. Also under the Commissioners of Inland Revenue are collectors of taxes. In each district there is a body, known as the General Commissioners (Commissioners of the General Purposes of the Income Tax); this body, which contains no official element, holds office independently of the Inland Revenue Commissioners, and is a quasi-judicial tribunal interposed between the Crown and the individual taxpayer, from whose ranks its members are drawn. It is the duty of the General Commissioners, subject to certain important exceptions, which include assessments to sur-tax,[1] to confirm assessments of taxation, and to hear appeals by the taxpayer and the Revenue authorities on questions of law and fact. If a taxpayer so wishes, he may (and usually does) appeal to the Special Commissioners rather than to the General Commissioners. From the General or Special Commissioners appeals lie on points of law only to the King's Bench Division, thence to the Court of Appeal and House of Lords.

[1] Made by the Special Commissioners of Income Tax (see p. 300, *post*).

CHAPTER 7.

THE POLICE.[1]

Local Police Authorities.

THE Metropolitan Police, whose jurisdiction extends over a fifteen-mile radius from Charing Cross, are under the control of the Home Secretary, who is the police authority. The executive head is the Commissioner of Police for the Metropolis, who is appointed by the Crown and is the disciplinary authority. The Commissioner makes appointments and has powers of suspension and dismissal. The City of London Police are an independent force, but the appointment of the Commissioner (Chief Officer) must be approved by the Home Secretary. The Court of Common Council is the police authority.

Elsewhere in England and Wales the Police are organised as county or borough forces. The local police authority for a county is the Standing Joint Committee. Less than half the boroughs maintain their own police forces. A separate police force cannot now be established for any borough with a population of less than 20,000: Local Government Act, 1933, s. 136. In those boroughs which have a separate police force, the authority is the Borough Council acting through the Watch Committee. The Standing Joint Committee is so called because its members are drawn half from the County Council and half from the Justices of Peace in Quarter Sessions. The local authority determines the size of its force and has the powers of appointment and of dismissal; these powers are in counties exercised by the Chief Constable as disciplinary authority; in boroughs they are exercised by the Watch Committee. The authority pays the salaries and wages of members of its force.

Special Constables.

The authorities charged with the preservation of the peace have for long had power to appoint special constables to supplement the regular police force in an emergency. Nowadays this power is exercised by two or more justices of the peace. Able-bodied male residents between the ages of twenty-five and fifty-five may be enrolled, notice of appointment being given to the Home Secretary and the Lord-Lieutenant of the county. Special constables may be appointed apart from an actual or apprehended emergency, and the Special Constables Acts, 1914 and 1923, made provision for

[1] For an account of the history of the police, see Hart and Hart, *Introduction to the Law of Local Government and Administration* (Butterworth), 2nd edition, Chap. 25.

the maintenance of a special constabulary reserve on a permanent footing.

Home Secretary and Local Police Forces.

The central administrative control of the Home Secretary is important. The appointment of the chief officer of police (Chief Constable) by the police authority is subject to the approval of the Home Secretary. The Police Act, 1919, s. 4, provides that "it shall be lawful for the Secretary of State to make regulations as to the government, mutual aid, pay, allowances, pensions, clothing expenses and conditions of service of all members of all police forces within England and Wales, and every police authority shall comply with the regulations so made." These regulations can only be made after consultation with the Police Council, a body constituted by the Act, on which representatives of police authorities and of all ranks of the police force sit. There is a uniform system of police pensions throughout the country: Police Pensions Act, 1921. Any member of the police force who feels aggrieved by the decision of the local police authority to dismiss him or require him to resign may appeal to the Home Secretary against such dismissal: Police (Appeals) Act, 1927. The Police (Appeals) Act, 1943, extended the right to appeal to questions of reduction in rank or rate of pay. In addition to regulation under the Police Act, 1919, which constitutes a system of legislation on all points of police administration, the Secretary of State exercises considerable control through the purse. Since 1856 a grant has been made out of the funds of the Exchequer towards the police expenses of local authorities, but the payment of this grant is, by statute, made conditional on the Home Secretary's certificate that the force is efficient in numbers and discipline. Inspectors of Constabulary have proved powerful instruments in maintaining efficiency. As the amount of the grant is one-half of the whole expenses, it is clear that no local authority can afford to forgo its certificate of efficiency.

Amalgamation of Forces.

The existence of so large a number of independent police forces has often been criticised. With modern means of locomotion the criminal need have no local associations, and on the grounds of efficient administration there is much to be said in favour of amalgamations on a large scale. Indeed, many voluntary amalgamations have taken place in recent years. The Defence (Amalgamation of Police) Regulations, 1942, made provision for the compulsory amalgamation of police forces as a war-time measure. But the idea of a national police force is repugnant to the English tradition of local government, and on constitutional grounds there are obvious objections to equipping the Executive with the equivalent of the continental gendarmerie. Not even in detective matters is there a national force, although for the purpose of unravelling complicated crimes the Criminal Investigation Department of the

Metropolitan Police has a great advantage over local forces. The assistance of this department of the Metropolitan Police is always available to the local forces, but so far the difficulties which arise in securing co-ordination between the department and the independent local forces seem to be insuperable. It still rests with the local authorities to decide whether or not assistance shall be invoked in any particular case.

Legal status of a Police Officer.

It is not easy to define the precise status of a police officer. Though appointed by a local authority and liable to dismissal by them, he is not in the strict sense their servant. Though subject in some respect to local supervision and required to obey certain local police regulations, a police officer is as such a servant of the State or ministerial officer of the central power.[1] " The powers of a constable as a peace officer, whether conferred by statute or by common law, are exercised by him by virtue of his office and cannot be exercised on the responsibility of any person but himself." [2] A police officer has been held to be " a person holding office under His Majesty." [3] A local authority cannot be sued for the wrongful acts of members of its police force.[4]

[1] *Fisher* v. *Oldham Corporation*, [1930] 2 K.B. 364.
[2] *Enever* v. *The King* (*Australia*) (1906), 3 C.L.R. 969, at p. 975.
[3] *Lewis* v. *Cattle*, [1938] 1 K.B. 454; for criticism of this decision, see W. I. Jennings in 2 *Modern Law Review*, p. 73.
[4] *Fisher* v. *Oldham Corporation* (*ante*).

CHAPTER 8.

ALLEGIANCE AND NATIONALITY ; ALIENS ; EXTRADITION ; FOREIGN ENLISTMENT.

A.

Allegiance and Nationality.

Allegiance.

ALLEGIANCE may be natural or local. British subjects owe allegiance to the King at all times wherever they may be. The subjects of the King owe him allegiance and the allegiance follows the person of the subject. He is the King's liege wherever he may be, and he may violate his allegiance in a foreign country just as well as he may violate it within the realm: *The King* v. *Casement*, [1917] 1 K.B. 98. Local allegiance is owed by all aliens within the realm and the King's protection. Allegiance is probably owed by enemy civilians within the realm in time of war and possibly by prisoners of war interned within the realm.[1] It is not owed before their capture by alien enemies coming to invade the realm.[2]

Allegiance and Protection.

A resident alien's duty of allegiance does not cease when the King's protection is temporarily withdrawn, owing to the occupation of the British territory where he is residing by enemy forces in time of war. In *De Jager* v. *Attorney-General of Natal*, [1907] A.C. 326 ; K. & L. 292, a resident alien was held guilty of treason, who, in such circumstances, joined an invading force, although that force was composed of nationals of his own country.

Protection.

The extent of the King's duty to provide protection cannot be precisely defined. It is a duty which cannot be enforced by the courts so far as the provision of protection for British subjects in foreign parts is concerned. If special protection is given by the armed forces of the Crown, the subject can be required to pay for it by process of law enforcing an agreement to make payment: *China Navigation Co.* v. *Attorney-General*, [1932] 2 K.B. 197 ; cf. *Glasbrook Bros.* v. *Glamorgan County Council*, [1925] A.C. 270 (obligation to pay for special police protection to private property).

British Nationality.

The status of a natural-born British subject born on or after January 1, 1915, is governed by the British Nationality and Status of Aliens Acts, 1914–43. These Acts recognise two principal criteria, place of birth and the nationality of the father. The status of British subjects born before January 1, 1915, is governed

[1] McNair, *Legal Effects of War*, 2nd ed., p. 16.

[2] *Ibid.*, pp. 17, 54–5. The offence of treason is based on a breach of allegiance, but the Treachery Act, 1940, applies to any person within the realm.

by the common law (*jus soli*), or in the case of persons of the first or second generation born abroad of British descent by the British Nationality Acts, 1730 and 1772,[1] which provided that the child of a British father is a natural-born British subject, provided that his father or paternal grandfather was born within the King's dominions and allegiance.

(i) Any person born within His Majesty's dominions and allegiance is a British subject whether his parents are British subjects or aliens. For this purpose His Majesty's dominions include the Dominions, British India and the Colonies, but not Protectorates. A person, however, who is born in a place where at the time of his birth His Majesty was exercising jurisdiction over British subjects shall, if his father was at the time of his birth a British subject, be deemed to be a natural-born British subject. British ships all over the world are regarded as being within the dominions of the Crown, but a foreign ship, even in British waters, is not.

(ii) British nationality is also acquired at birth by any person born out of His Majesty's dominions whose father was at the time of that person's birth a British subject, and who fulfils any of the following conditions:

(*a*) The father was born within His Majesty's allegiance.

(*b*) The father had been naturalised.

(*c*) The father had become a British subject through annexation of territory.

(*d*) The father was at the time of the child's birth in the service of the Crown.

(*e*) The birth was registered at a British Consulate within one year or at any time with the permission of the Home Secretary.

Where nationality depends upon registration of birth, the person concerned ceases to be a British subject, unless he asserts his British nationality by a declaration of retention made within one year of attaining the age of twenty-one. The period may be extended by the Home Secretary, in which case the person concerned is deemed never to have lost British nationality.

Posthumous children are born British subjects if they would have been so born, had their father lived.

The status of a wife depends on that of her husband. Thus an alien-born woman obtains British nationality by the fact of marrying a British husband. Correspondingly British status is lost by a woman who marries an alien, if thereby she acquires the nationality of her husband, a matter which depends on the municipal law of the State of which the husband is a national. If she does not acquire

[1] The status of a person born abroad before 1915, whose father was a British subject, is governed also by the British Nationality and Status of Aliens Act, 1943, s. 1.

her husband's nationality, she does not, by reason of her marriage only, cease to be a British subject; and this applies also to the wife of a British subject who, though her husband acquires a new nationality during the marriage, does not herself acquire that nationality. Even if she does acquire the new nationality, she may by declaration retain British nationality. A wife who is a British subject can retain her British nationality by express declaration if, during the continuance of the marriage, the husband acquires a new nationality which the wife also acquires by reason of her husband's naturalisation. Widows and divorced women retain the status of their former husbands. Infants take the status of their parents, save that, if a widow of a British subject marries an alien, her children by her first marriage do not lose their nationality.[1]

Loss of Nationality.

Nationality acquired by birth, as well as that acquired by naturalisation, may be divested. This was not so at common law, but by the Acts a British subject who becomes naturalised when in a foreign State ceases automatically to be a British subject, and, moreover, in certain circumstances (*e.g.* dual nationality) a declaration of alienage may be made without formal naturalisation in a foreign State. In one circumstance a British subject cannot divest himself of his nationality. In time of war, neither by naturalisation in an enemy nor (possibly) in a neutral State,[2] nor by a declaration of alienage except with the permission of the Home Secretary, can a British subject revoke his nationality. The leading case is *The King* v. *Lynch*, [1903] 1 K.B. 444; K. & L. 289. Lynch (who subsequently sat in the House of Commons as a Nationalist member for an Irish constituency) was accused of high treason. One of the overt acts alleged was that he had taken the oath of allegiance to the enemy during the Boer War. He was convicted, but subsequently pardoned. The wife of an alien who is a subject of a State at war with His Majesty may, if she was at birth a British subject, at the discretion of the Home Secretary, be allowed to resume her British nationality.

Acquired Nationality.

With regard to acquired nationality (Part II. of 1914 Act), the Home Secretary exercises an absolute discretion to refuse a certificate of naturalisation to an alien who desires to become a British subject. He is further precluded by the Act from granting a certificate unless the alien satisfies the following conditions:

(*a*) That he has resided in His Majesty's dominions for five out of the preceding eight years, of which the year immediately antecedent to the application must have been spent in the United Kingdom. This qualification need not be shown by a widow, or

[1] An illegitimate child born in a foreign country of a British woman is an alien.

[2] See *Vecht* v. *Taylor* (1917), 116 L.T. 446, which leaves the point open.

divorced wife of an alien, who was herself a British subject before marriage, nor by an alien who has served under the Crown for five out of the last eight years.

(*b*) That he is of good character at the date of the grant of the certificate and has an adequate knowledge of the English language.

(*c*) That he intends to reside in the dominions of the Crown, or to enter into, or continue in, the service of the Crown.

When after 1933 a certificate of naturalisation is granted to an alien, his wife, if not already a British subject, shall not be deemed to be a British subject, unless within a limited time she makes a declaration that she desires to acquire British nationality.

Naturalisation Discretionary.

But the alien has no right to the certificate if, in spite of his being qualified under these conditions, the Home Secretary declines to exercise his discretion in his favour. Minors may be naturalised without fulfilling the above conditions. The effect of naturalisation is that the alien, on taking the oath of allegiance, becomes entitled to all political and other rights, powers and privileges, and subject to all obligations and duties to which a natural-born British subject is entitled or subject. But the Home Secretary also has a power to revoke a certificate of naturalisation. The power has to be exercised if the Secretary of State is satisfied that the person to whom the certificate has been granted obtained it by fraudulent means or has shown himself by act or speech to be disaffected or disloyal. It may be exercised on certain other grounds which include lack of good character at the date of the grant of the certificate. In this event the holder of the certificate may claim that the case be referred for enquiry by a committee presided over by a person who holds or has held high judicial office.

Disaffection and disloyalty are sufficiently vague terms to enable the discretion to be regarded as virtually absolute. And indeed " good character " is so vague as to be capable of causing injustice to the naturalised alien whose certificate is revoked, should political considerations ever be allowed to influence the exercise of the discretion. Revocation of a certificate does not affect the status of the wife or children of the person whose certificate is revoked, unless the Secretary of State by order directs that they or any of them shall cease to be British subjects, but the wife may within six months make a declaration of alienage. There is no power for the Secretary of State to make any such order in the case of a wife who was at birth a British subject, unless he is satisfied that, if she had held a certificate of naturalisation in her own right, the certificate could properly have been revoked under the Acts.

Dominion Nationality.

The definition of a natural-born British subject contained in the British Nationality and Status of Aliens Acts, 1914–43, is valid throughout the Empire except Eire. The Nationality and Citizenship

Act, 1935, an Eire Act, repealed the Acts, substituting for the title of "British subject" that of "citizen of the Free State," while preserving the possibility of utilising the privileges of British citizenship for Free State nationals living in Great Britain and other parts of the Empire. British Commonwealth subjects have been exempted by an Order of the Executive Council from the provisions of the (Eire) Aliens Act, 1935; apart from this Order they are aliens under the law of Eire. A Dominion has since the passing of the Statute of Westminster, 1931,[1] power to repeal the Acts in so far as they form part of the law of that Dominion, but the definition of a British subject would still be valid for imperial purposes, *e.g.* the Foreign Jurisdiction Acts. The Dominions are agreed that a common status is desirable, and the Imperial Conference, 1930, recommended that no change should be made apart from imperial action by all members of the British Commonwealth. A Dominion is, however, completely free to define its own nationals, and local nationality has been defined by Canada and the Union of South Africa, as well as by Eire.

Dominion Naturalisation.

Similar problems arise in the matter of naturalisation. In order to render possible a common status of naturalised British subjects all the Dominions, except Eire, have adopted Part II. (Imperial Naturalisation) of the Act of 1914. In the past the law on this topic was not uniform throughout the Empire. This is well illustrated by a naturalisation case arising under the Act of 1870, which still remains the Act governing certificates of naturalisation issued before January 1, 1915.

> A man, who was born in Germany in 1859 and who went to Australia at the age of nineteen, became naturalised under the Commonwealth law in 1908. He afterwards came to reside in London, where he was charged with, and convicted of, an offence under the Aliens' Restriction Order then in force. The court held that taking the oath of allegiance to the King after the grant of a certificate of naturalisation under the Commonwealth Act did not make him a British subject in the United Kingdom: *The King* v. *Francis, ex parte Markwald*, [1918] 1 K.B. 617; *Markwald* v. *Attorney-General*, [1920] 1 Ch. 348.

The result of the adoption by the Dominions of Part II. of the Act of 1914 is that naturalisation conferred under the Act in one part of the Empire is recognised in other parts. It is still, however, possible for both Dominion and Colonial legislatures to confer local nationality by naturalisation. This power was reserved by section 26 of the 1914 Act. The considerations which apply to the desirability of the maintenance of a common definition of a natural-born British subject apply equally to the maintenance of a common status of naturalised British subjects.

[1] Subject, in the case of New Zealand and Newfoundland, to the adoption of the operative sections of the statute (see Part X., Chap. 3).

B.

Aliens.

Status of Aliens.

An alien has full proprietary capacity, except that he may not own a British ship. He may not exercise the franchise, parliamentary or local, nor may he hold a public office. An alien has no right to be admitted into the King's dominions.[1] It is probable that the Crown may even in time of peace expel an alien under the prerogative.[2] The expulsion of aliens is now, however, regulated by statutory powers.

Admission, Supervision and Deportation.

The admission and deportation of aliens is governed by the provisions of the Aliens Order, 1920, made under the powers conferred by the Aliens Restriction Acts, 1914 and 1919.[3] Article 1 of that Order prevents leave being given to an alien to land in the United Kingdom, unless he complies with certain conditions, *e.g.* that he is in a position to support himself and his dependants, or that it is not undesirable on medical grounds that he should be permitted to land.

The regulations fall under three heads:

1. *Admission.*
   The immigration officers have a general discretionary authority to grant or to refuse leave to land to any alien coming from outside the United Kingdom, but they must not grant leave to land to any alien who fails to fulfil the conditions laid down in Article 1 of the Aliens Order, 1920. In the case of any alien seeking admission with a view to taking employment, leave to land cannot be granted, unless the alien is able to produce a permit issued to his prospective employer by the Ministry of Labour.
2. *Supervision.*
   The registration and supervision of registered aliens is carried out by the police under Home Office instructions and is compulsory after three months' residence. The Acts permit of drastic supervision and restrictions in the event of war or a major emergency.
3. *Deportation.*
   The Home Secretary has power to order the deportation of any undesirable alien, if he considers it is in the public interest. He may consult an advisory committee in the case of proposed deportations based on any grounds other than landing in the

[1] *Musgrove* v. *Chung Teeong Toy*, [1891] A.C. 272.
[2] McNair, *op. cit.*, p. 34; but see Dicey, *op. cit.*, p. 225.
[3] The Act of 1914 applied only in time of war, imminent national danger, or grave emergency. It was extended for one year in time of peace by the Act of 1919, which is itself renewed each year by an Expiring Laws Continuance Act.

United Kingdom without permission or failure to observe the conditions imposed on landing. The functions of the committee are exclusively advisory, and the Home Secretary is not bound to consult the committee in every case where he proposes to make an order for deportation under the general discretionary power conferred by Article 12 (6) (*c*) of the Aliens Order, 1920. In the case of an alien convicted of a criminal offence, the power of deportation is usually exercised on a recommendation which the court can make under the regulation for the expulsion of any convicted alien. The courts will restrain an excess of this power. Thus if the Home Secretary ordered the deportation of a British subject in the belief that he was an alien, the subject could have the issue of alienage or non-alienage determined in Habeas Corpus proceedings: *Eshugbayi Eleko* v. *Government of Nigeria*, [1931] A.C. 662, at p. 670. Similarly it seems the court could go behind an order for an alien's arrest which, though valid on its face, was a mere sham not made *bonâ fide*: *The King* v. *Superintendent of Chiswick Police Station, ex parte Sacksteder*, [1918] 1 K.B. 578. A deportation order, being an administrative act and not a judicial one, cannot, however, be quashed by certiorari on the ground that the Home Secretary held no enquiry: *Ex parte Venicoff*, [1920] 3 K.B. 72; K. & L. 144.

Alien Enemies.

Alien enemies are inevitably subject to drastic restrictions in time of war imposed either under the prerogative, the Aliens Restriction Acts or Defence Regulations. An enemy alien permitted to remain in this country is within the King's protection and may sue in the King's courts. A person residing voluntarily on enemy territory, including territory occupied by the enemy,[1] or carrying on business in such territory is, on the other hand, debarred from suing in the King's courts, whether he be an enemy, a neutral or a British subject.[2] Such persons are enemies in the sense that they are on the other side of the line of war, and it is trade with enemies in this sense that is forbidden in time of war by the Trading with the Enemy Acts and also by common law. The outbreak of war does not automatically bring about the confiscation of enemy private property, but the Crown may before the conclusion of peace confiscate the property of an alien enemy (in the national sense) by the ancient procedure of inquisition of office.[3] It is customary to vest enemy private property in a custodian of enemy property and to provide for its disposition by peace treaty.

[1] *V/o Sovfracht* v. *N. V. Gebr. Van Udens Scheepvaart en Argentuur Maatschappij*, [1943] A.C. 203.
[2] *Porter* v. *Freudenberg*, [1915] 1 K.B. 857.
[3] McNair, *op. cit.*, p. 125.

C.

Extradition.

Extradition relates to the surrender by one State to another of persons who are fugitives from justice. The delivery of the accused or convicted person is made on the request of the State seeking to secure the fugitive's person. It is possible for a person accused, or convicted in his absence, of a crime under the law of State A to be surrendered by State B, where he resides, as a fugitive criminal from State A without ever having been present in State A, and this is true even of a national of State B, if the relevant treaty provides for the extradition of nationals: *The King* v. *Godfrey*, [1923] 1 K.B. 24, where the court ordered the surrender of a British subject to the Swiss authorities on a charge under Swiss law of false pretences alleged to have been made in Switzerland by the partners of the accused to which he, a resident in England, was an accessory. There is no formulated rule of public international law on the subject of extradition, but the need for it is recognised by practically all civilised States as a matter both of morality and expediency; of morality since mankind deprecates escape from the consequences of, at all events, serious crime; of expediency in that no State desires to become a haven of refuge for the underworld.

Extradition is controlled by two factors, namely (1) statute law defining the grounds of, and the procedure for, surrender of criminals, and (2) treaties with foreign States. In order to secure the surrender, both the municipal law and the provisions of the particular treaty must be satisfied. In *The Queen* v. *Wilson* (1877), 3 Q.B.D. 42, it was held that section 6 of the Extradition Act, 1870, which provided that every fugitive criminal shall be liable to surrender must be interpreted in light of the treaty with Switzerland, which excluded at that time the surrender by Great Britain and Switzerland of their own nationals.

No proceedings can be taken unless an extradition treaty has been concluded with the foreign State which seeks the surrender of the fugitive, or into whose territory the fugitive has escaped or is sheltering from British justice. The Extradition Acts of 1870 to 1932, which define extraditable offences [1] and the procedure for surrender, require that the terms of a treaty be brought into force by means of an Order in Council. About fifty treaties have been concluded by the United Kingdom. In some cases there is no provision for the extradition of nationals of the contracting parties (though it is not essential that there should be reciprocity in this respect), *e.g.* an

[1] See also Counterfeit Currency (Convention) Act, 1935, ss. 4–6.

Italian who is wanted on a criminal charge in this country will not be extradited from Italy, if he has succeeded in escaping thither. This restriction does not, of course, affect any remedy which a State may have against a national in respect of his crimes committed in the United Kingdom. There is one exception to the category of crimes in respect of which extradition proceedings may be brought under the treaties. No person accused of a purely political offence can be extradited. It is not, however, easy to define a purely political offence—*The Queen* v. *Castioni*, [1891] 1 Q.B. 149; *The Queen* v. *Meunier*, [1894] 2 Q.B. 415—for such an offence may, or may not, involve violence; and if it is a crime of violence, it may be political on the ground of being incidental to a political disturbance, in which case extradition will not be ordered by the English courts, or committed merely to satisfy private vengeance, as with an isolated act of bomb-throwing by an anarchist. In the latter case the offender is not permitted to shield himself behind the exception.

Procedure.

The process for securing the extradition of an offender who has escaped to this country is as follows: The diplomatic representative of the country desiring extradition of a fugitive offender makes a request to the Foreign Office for his arrest, sending at the same time evidence on which the charge is based, or, if the person has already been convicted in the country where he committed the crime, evidence of his conviction and sentence. The Foreign Office forwards the request to the Home Office, whereupon the Home Secretary, unless he considers the offence to be a political one, issues an order to the Chief Metropolitan Magistrate at Bow Street, who, in turn, issues his warrant for the criminal's arrest to the Metropolitan Police. This process may be curtailed, as the Extradition Acts provide for a warrant being issued on sworn information prior to the order for proceedings by the Home Secretary; but the order must be made later, if proceedings are continued. All cases have to be investigated before the Chief Magistrate or another of the Metropolitan Magistrates sitting at Bow Street. In the event of the magistrate deciding that the offender should be committed to prison to await his surrender, fifteen days must elapse, during which the offender may apply to the High Court for his release by means of a writ of habeas corpus. The surrender will not be ordered unless the offence alleged is one which substantially coincides with an indictable offence under English criminal law. It may also be refused on the following grounds:

(1) Insufficient evidence of identity.

(2) That the offence is not within the treaty.

(3) That the offence alleged is not against the law of the country requesting the surrender.

(4) That no *prima facie* case has been made out.

(5) That the offence is purely political, or that the surrender is sought for a political object.

Section 19 of the Extradition Act, 1870, restricts the offences for which a surrendered person may be tried here to such crimes as may be proved by the facts on which the surrender is grounded: see *The King* v. *Corrigan* (1930), 47 T.L.R. 27. For example, a person surrendered by France on facts which supported a charge of arson could not after surrender be tried for forgery without being given an opportunity of first returning to France.

The surrender of fugitive criminals to, or by, British Dominions and Colonies is dealt with by the Fugitive Offenders Act, 1881. The procedure authorised is similar to that for extradition, but is simpler. Political offences are not excluded, and there is no diplomatic application, but in practice all applications go through the Home Office and, as the case may be, the Dominions or Colonial Office. Both the Extradition Act, 1870, and this Act are imperial statutes and are therefore law in a Dominion, until altered by the Parliament of that Dominion.

D.

Foreign Enlistment.

To enable the Government of a neutral State to fulfil its obligations towards a belligerent State it is necessary for the former to control and sometimes prohibit certain activities of its nationals. The Foreign Enlistment Act, 1870, prohibits (*a*) enlistment by a British subject in the military or naval service of any foreign State at war with a friendly State; (*b*) quitting by such person from His Majesty's dominions for that purpose; (*c*) building, equipping or despatching a ship with intent or knowledge that it will be used in such military or naval service; (*d*) preparing or fitting out any naval or military expedition to proceed against the dominions of a friendly State. The last two prohibitions (*c*) and (*d*) apply to any person, subject or alien, within His Majesty's dominions.

Breach of a blockade imposed by a foreign State and the carriage of contraband are normally[1] permitted when Great Britain is neutral, though the Crown will not protect its nationals against the seizure by a belligerent of the property involved.

[1] See, however, Merchant Shipping (Carriage of Munitions to Spain) Act, 1936.

CHAPTER 9.

FOREIGN AFFAIRS.

A.

Acts of State.

THOSE acts of the Crown which are done under the prerogative in the sphere of foreign affairs are known as acts of State.[1] Instances of acts of State are the declaration of war,[2] the making of peace, and the recognition of foreign Governments.

Act of State, the wide sense.

The term, "act of State," means "an act of the Executive as a matter of policy performed in the course of its relations with another State, including its relations with the subjects of that State, unless they are temporarily within the allegiance of the Crown."[3] Such an act is not justiciable by the courts. It gives rise neither to contractual rights nor claims in tort. The term "act of State" has also been defined as follows: "an exercise of sovereign power" which "cannot be challenged, controlled or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, municipal courts must accept it, as it is, without question": *per* Fletcher Moulton, L.J., in *Salaman* v. *Secretary of State for India*, [1906] 1 K.B., at p. 639. Such matters as fall properly to be determined by the Crown as acts of State in this sense are not subject to the jurisdiction of the municipal courts, and rights alleged to be acquired thereunder, *semble* even by British subjects, cannot be enforced by such courts.[4] Acts resulting from a treaty of cession or by reason of annexation of territory fall into this class; such acts may confer a title to property on the Crown which must be accepted by municipal law: *West Rand Central Gold Mining Co.* v. *The King*, [1905] 2 K.B., at p. 409. In this case a British corporation failed to establish by petition of right the right

[1] P. 127, *ante*.

[2] But should the Crown come to any person not being a native of England, the nation is not obliged to engage in war for the defence of territories not belonging to the Crown of England without the consent of Parliament: Act of Settlement, 1701.

[3] "Act of State in English Law," by E. C. S. Wade, *British Year Book of International Law*, 1934, p. 98.

[4] See *Rustomjee* v. *The Queen* (1876), 2 Q.B.D., at p. 73; K. & L. 298, and *Civilian War Claimants' Association* v. *The King*, [1932] A.C. 14 (no right of subjects to sums payable to the State as reparations under the Treaty of Versailles, 1919).

to enforce against the Crown a claim for a wrong inflicted upon it by the Government of a State (the former South African Republic) which had been extinguished by acts upon the part of the Crown which were acts of State, namely, conquest and annexation. No interference with the rights of British subjects enforceable in British courts was thereby involved, and it lay within the discretion of the Crown to determine which, if any, of the liabilities of the extinguished State it was prepared to assume. In *Nabob of the Carnatic* v. *East India Company* (1792), 2 Ves. Jun. 56, there was dismissed a bill in equity founded upon treaties between the Nabob and the Company; the treaties were political and made between a foreign Power and subjects of the Crown acting as an independent State under charter and statutory powers; they were therefore not subject to the jurisdiction of the courts.[1]

Effect of Acts of State on British Subjects.

The Crown cannot justify interference whenever or wherever committed with the rights of a British subject by the plea of act of State. Thus the treaty-making power of the Crown does not dispense with the necessity for legislation where the creation of a treaty requires a modification of the existing rights of subjects.[2] On the other hand, acts which are within the undoubted power of the Crown may indirectly have an effect upon private rights. Thus the declaration of war will render it illegal to carry out existing contracts with alien enemies; the recognition of a foreign Government may affect the result of a lawsuit depending upon the validity or otherwise of a foreign decree confiscating property abroad[3]; the recognition of the diplomatic status of a foreigner will render him immune from suit by a subject in a British court.

Act of State as Defence to Action of Tort.

The plea, act of State, can be raised as a defence to an act, otherwise tortious or criminal, committed by a servant of the Crown against a subject of a foreign State or his property, provided that the act was authorised or subsequently ratified by the Crown. The use of the term in such a case is in the nature of a special defence qualifying the rule of municipal law which normally prevents a wrongdoer setting up that his tortious act was done by command of the Crown.

This defence is illustrated by *Buron* v. *Denman* (1848), 2 Ex. 167; K. & L. 295.

> A naval commander stationed on the coast of Africa was ordered by the Governor of a British colony to secure the release of British subjects detained as slaves on foreign territory. He exceeded his instructions, since, in addition to releasing the slaves, he set fire to a barracoon belonging to a Spaniard who was trading in slaves at the place. The Spaniard brought an action in the English courts against the officer, but, the proceedings having been reported to the Home

[1] For acts of State in protectorates, see p. 369, *post*.
[2] P. 182, *post*.
[3] P. 185, *post*.

Government, the Crown adopted the act of the officer. The court held that the subsequent ratification by the Crown was equivalent to prior authorisation and that no action lay in respect of an act of State.

But such a defence is not available against a British subject. Thus in *Walker* v. *Baird*, [1892] A.C. 491 ; K. & L. 310 :

An action for trespass was brought against a naval captain who had seized the respondent's lobster factory under Admiralty orders with the object of enforcing the terms of a treaty with France. The lobster factory was situated on British territory. Held that the defence that the matters complained of were acts of State and so could not be enquired into by the courts was untenable and that legislation would have been required to legalise such action.

In this case the Crown tried unsuccessfully to establish the right, as an incident of its treaty-making power, to compel its subjects to recognise the provisions of a treaty having for its object the preservation of peace. The Privy Council, however, held that the allegations contained in the statement of defence did not bring the case within the limits of this proposition and refused to decide the point.

Nor can an act of State be pleaded as a defence to a wrongful act against an alien, the subject of a friendly State resident on British territory.

Johnstone v. *Pedlar*, [1921] 2 A.C. 262 ; K. & L. 312.

An American subject was arrested by the Dublin police (before the establishment of the Irish Free State) and subsequently sentenced to a term of imprisonment for illegal drilling. At the time of his arrest a considerable sum of money was found on his person. Having served his sentence, the prisoner sued the police for the return of his money. The police put in at the trial a certificate by the Chief Secretary for Ireland confirming the seizure of the money. The seizure was ratified on behalf of the Crown as an act of State by the Chief Secretary for Ireland. Held that the alien had a legal remedy for the recovery of the money, his status being as regards civil rights assimilated, with minor exceptions, to that of a subject.

It is arguable that, in the case last cited, the defence of act of State might have prevailed, had the Crown formally withdrawn its protection owing to the alien's treasonable acts. On the other hand, it can also be contended that the defence of act of State is never available against aliens in respect of acts done within British territory. This view was expressed *obiter* by Scrutton, L.J., in *Commercial and Estates Co. of Egypt* v. *Board of Trade*, [1925] 1 K.B. 271, at p. 290. The point was left undecided in *Johnstone* v. *Pedlar* (*ante*). An alien resident abroad may, of course, seek redress by diplomatic means.

An act of State authorised by a foreign ruler may empower a British subject to seize British-owned goods on a British ship in foreign territorial waters: *Carr* v. *Fracis Times and Co.*, [1902]

A.C. 176. It will not, however, justify a wrong committed on such authority outside the jurisdiction of the foreign ruler: *The Queen* v. *Lesley* (1860), Bell C.C. 220.

B.

State Immunity.

The immunity of Heads of State and State property may be classified under three heads:

(*a*) Immunity of Heads of States.

(*b*) Diplomatic and consular immunity.

(*c*) Immunity in respect of public property of a foreign State.

The immunity is one from legal process, and its nature may be illustrated by the following case:

Mighell v. *Sultan of Johore*, [1894] 1 Q.B. 149.

> The Sultan, while visiting this country, became engaged to a young woman to whom he disclosed his identity as being that of Mr. Albert Baker. The Sultan having failed to fulfil his promise of marriage, the lady attempted to serve a writ on him for breach of promise of marriage.
>
> Held that as a ruler of an independent foreign State, Johore being so regarded for this purpose, the Sultan was immune from process, unless he submitted to the jurisdiction.

The Parlement Belge (1880), 5 P.D. 197, laid down the important principle, that as a consequence of the independence of every sovereign authority a State will decline to exercise any of the territorial jurisdiction of its courts over the person of any sovereign or ambassador, or over the public property of any State destined for the public use, or over the property of any ambassador, even though the sovereign, ambassador or property be within its territory. This statement was occasioned by the seizure, under process of the Admiralty Division (to secure redress for collision damage), of a packet steamer which had collided with a ship of a British subject. The vessel was the property of the King of the Belgians and carried mails for his Government, as well as private passengers and merchandise.

The immunity may be waived by an unequivocal act of submission: *Duff Development Co.* v. *Government of Kelantan*, [1924] A.C. 797; K. & L. 316. It is an immunity, not from liability, but from local jurisdiction. Accordingly, a motor-car insurance policy indemnifying a person who enjoys immunity is enforceable, if the insured submits to being sued, even though he could not have been sued except on his own voluntary submission: *Dickinson* v. *Del Solar*, [1930] 1 K.B. 376.

(*a*) Immunity of Head of State.

Heads of States consist of Monarchs and Presidents. A Monarch of a foreign State visiting this country with the knowledge of the Government is afforded certain honours and enjoys certain protection and immunities. In particular, he cannot be subjected to the criminal jurisdiction of the courts, nor compelled against his will to plead in a civil court. He may, of course, himself be a plaintiff. Under the so-called doctrine of extra-territoriality he is immune from all taxation and his residence is inviolable. The position of a President is less certain, but it may be assumed that, having regard to the number of important States having this type of ruler, the practice does not differ substantially from that adopted in the case of visiting Monarchs.

(*b*) Immunity of Diplomatic Representatives.

The immunity of diplomatic representatives is part and parcel of that enjoyed by the heads of the States which they represent, though some writers attribute it to the necessity of such persons being free from the local jurisdiction, in order the better to perform the duties they owe to the accrediting country. In English law immunity is founded on statute. The Diplomatic Privileges Act, 1708, provided that

> " all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other publick minister of any foreign prince or state authorised and received as such by Her Majesty her heirs or successors, or the domestick or domestick servant of any such ambassador or other publick minister may be arrested or imprisoned or his or their goods or chattels may be distrained or seized or attached shall be deemed and adjudged to be utterly null and void to all intents constructions and purposes whatever."

This Act is declaratory of the common law and international practice, and behind it lies the principle accepted by the courts in *The Parlement Belge* (*ante*). The person of a diplomatic envoy is inviolable and is protected by the criminal law, which makes interference with State envoys a misdemeanour. The protection is extended to their families, suites, official residences, papers and mails. No diplomatic envoy may be punished for any criminal offence by the courts, but this does not mean that he may misconduct himself with impunity. He is expected to conform to the law of the land, unless it is likely to interfere with the free conduct of his duties. He is liable to be recalled on representation made to his home Government by the Foreign Secretary.

The consequences of the extra-territoriality granted to diplomatic envoys by municipal law fall under five principal heads: [1]

(*a*) Immunity of domicile, so far as is necessary for the independence and inviolability of envoys.

[1] As classified in Oppenheim, *International Law* (Longmans), Vol. I., 5th ed., pp. 619–27.

(*b*) Exemption from civil and criminal jurisdiction; even the issue of a writ of summons is void: *Musurus Bey* v. *Gadban*, [1894] 2 Q.B. 352. There are some minor exceptions from the immunity from civil process and the immunity may be waived.

(*c*) Exemption from being a witness on subpoena.

(*d*) Exemption from police orders and regulations.

(*e*) Exemption from taxation and local rates.

Consular immunities are not of great importance, and their extent is inconsiderable.

The Diplomatic Privileges (Extension) Act, 1941, extended diplomatic immunity to the representatives of allied Governments established in this country during the Second World War, and the Diplomatic Privileges (Extension) Act, 1944, enabled the Crown to concede further extensions to international organisations and their officers.

(*c*) Immunity in respect of Public Property of a Foreign State.

It was in connection with immunity of State property that *The Parlement Belge* (*ante*) was decided. The law relating to ships (other than men-of-war) which enjoy immunities in international law may be summarised as follows:[1]

(i) A British court of law will not exercise jurisdiction over a ship which is the property of a foreign State; nor can any maritime lien attach, even in suspense, to such a ship, so as to be enforceable against it, if and when it is transferred into private ownership.

(ii) Ships which are not the property of a foreign State, but are chartered or requisitioned by it or otherwise in its possession and control (see *Government of the Republic of Spain* v. *S.S. Arantzazu Mendi*, [1939] A.C. 256), may not be arrested by process of the Admiralty Court while subject to such possession and control, nor will any action lie against the foreign State; . . . but when the governmental possession and control cease to operate and she is redelivered to her owner, an action *in personam* will lie against him in respect of salvage services rendered to her while in governmental possession and control, when he has derived a benefit from those services.

From the case of *The Porto Alexandre*, [1920] P. 30—a case of salvage—it appears that this immunity extends to the freight earned by such ships, and presumably to the cargo itself, if publicly owned. It is, however, not certain whether immunity attaches to a State-owned trading ship as opposed to a ship requisitioned for public purposes. In *The Parlement Belge* (*ante*) and *The Porto Alexandre* (*ante*) the view was expressed that the immunity applied to all State-owned ships, but the House of Lords has left the matter open: *Compania Naviera Vascongado* v. *S.S. Cristina*, [1938] A.C. 485. The captains of foreign public ships are habitually allowed to exercise

[1] See Oppenheim, *op. cit.*, Vol. I., 5th ed., pp. 669–70.

jurisdiction over members of their crew, though such jurisdiction may be waived; *Chung Chi Cheung* v. *The King*, [1939] A.C. 160.

Importance of Immunity in respect of Property.

The subject of immunity, while part of international law, is of constitutional importance, because, as has been remarked earlier, the immunities enjoyed constitute a class of persons outside the ordinary law of the land. So long as the immunities were confined to the persons of sovereigns or other rulers and their representatives, they were comparatively unimportant. The same cannot be said of their extension to property. As Scrutton, L.J., said in *The Porto Alexandre* (*ante*):

> "No one can shut his eyes . . . to the fact that many States are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult; but it seems to me the remedy is not in these courts. *The Parlement Belge* excludes remedies in these courts. But there are practical commercial remedies. If ships of the State find themselves on the mud because no one will salve them when the State refuses any legal remedy for salvage, their owners will be apt to change their views. If the owners of cargoes on national ships find that the ship runs away and leaves them to bear all the expenses of salvage, as has been done in this case, there may be found a difficulty in getting cargoes for national ships. These are matters to be dealt with by negotiations between Governments. . . ."

A convention entered into by Great Britain and other maritime States in 1926 embodied the general principle that ships and cargoes operated and owned by States for commercial purposes shall be subject in time of peace to ordinary maritime law. The convention has not yet been ratified and will probably be modified before ratification takes place. It will, of course, call for legislation before any change in the existing law can be effected.

C.

Treaties.

No one but the King can conclude a treaty. The term, treaty, is used somewhat loosely of all international engagements in written form, but it must be remembered that such engagements are as capable of classification as documents in municipal law. Thus, just as it would be incorrect to describe the effects of a simple contract in writing and a conveyance as identical, so a commercial agreement with another State differs from a treaty of cession or from a law-making treaty. A more exact terminology of international agreements confines the term, treaty, to the more solemn agreements, such as treaties of peace, alliance, neutrality and arbitration. The term, convention, is used of multi-lateral law-making treaties, *e.g.* the

Slavery Convention. Agreements declaratory of international law are styled declarations, *e.g.* the Declaration of London, 1909. A protocol denotes a treaty amending or supplemental to another treaty. The term, pact, has been made familiar by the Peace (Kellogg-Briand) Pact of Paris, 1928.

Parliament and Treaties.

At first sight the treaty-making power appears to conflict with the constitutional principle that the King by prerogative cannot alter the law. In practice, however, it must be remembered that treaties are concluded on the advice of Ministers, who will normally be in a position to command a majority in Parliament. There is then no difficulty in obtaining from Parliament any consequential amendment of the law which the treaty may involve. Treaties involving the cession of territory were at one time thought to be exempt from this necessity of obtaining implementation by Parliament, just as are declarations of war. But nowadays treaties of cession are either made conditional on confirmation by Parliament (Anglo-Italian (East African Territories) Act, 1925), or are subsequently submitted to Parliament for express approval (Anglo-Venezuelan Treaty (Island of Patos) Act, 1942). It is easy to see that such treaties may sometimes involve an alteration in the substantive rights of subjects, particularly those who live in the ceded territory, in respect of their nationality. Moreover the assumption of part of the national debt appropriate to the ceded territory will normally involve a charge on the public funds of the State to which the territory is ceded. Once a treaty has been made, Parliament can neither change nor reject it without in effect passing a vote of censure on the Government that made it.

The question—When do British treaties involve legislation ?—has been answered by a leading authority [1] in the following summary:

(1) Treaties which, for their enforcement by British courts of law, require some addition to, or alteration of, the existing law, cannot be carried into effect without legislation.[2] The King will not be advised to ratify such treaties unless and until such legislation has been passed, or Parliament has given the necessary assurance that it will be passed. A treaty imposing upon Great Britain a liability to pay money, either actually or contingently, usually falls within this category, because, as a rule, money cannot be raised or expended without legislation.

(2) Treaties, *e.g.* some of The Hague Conventions which modify the rights of the Crown when engaged in maritime warfare, and thus the law administered in British Prize Courts, will be recognised by

[1] See article by Sir Arnold McNair, in *British Year Book of International Law*, 1928, " When do British Treaties involve Legislation ? "

[2] This principle was declared in *The Parlement Belge* (1879), 4 P.D. 129, though the declaration was not strictly necessary to the decision. The point was raised, but not determined, in *Walker* v. *Baird*, [1892] A.C. 491 ; K. & L. 310.

the courts without legislation, but not treaties which attempt to increase the rights of the Crown:[1] *The Zamora*, [1916] 2 A.C. 77; K. & L. 66.

(3) Treaties made expressly subject to the approval of Parliament require its approval, which is usually given in the form of a statute.

(4) It is the practice, and probably by now may be regarded as a binding constitutional convention, that treaties involving the cession of British territory (apart from the Indian Empire) require the approval of Parliament given by a statute.[2]

Formalities of Treaty-making.

The first step in negotiation of a treaty is the issue of a document known as a Full Power to one or more representatives, the Foreign Secretary, another Minister of the Crown or an Ambassador or other diplomat. The negotiating States submit their respective Full Powers for verification. On the conclusion of the treaty the representatives, styled plenipotentiaries, sign and seal the formal document. Normally the final stage is ratification, which means the sealing of the instrument of ratification by the King and the exchange or deposit of the treaty at an agreed place. Treaties requiring ratification by the Crown are usually laid before Parliament for twenty-one days before the instrument of ratification is submitted to the King.[3]

D.

Declarations by the Executive relating to Foreign Affairs.

There are certain matters, chiefly relating to foreign affairs, where the declaration of the Government is treated as a conclusive statement binding upon the courts. Such declarations may be described as acts of State. They relate to matters which it falls to the Crown to determine:

(*a*) Recognition of States or Governments: *Aksionairenoye Obschestvo, A. M. Luther* v. *J. Sagor & Co., Ltd.*, [1921] 3 K.B. 532.

(*b*) Status of foreign States or Governments: *The Dora*, [1919] P. 105; *Duff Development Co.* v. *Government of Kelantan*, [1924] A.C. 797; K. & L. 316.

(*c*) The question whether a person is entitled to diplomatic status: *Engelke* v. *Musmann*, [1928] A.C. 433.

(*d*) The existence of a state of war: *Janson* v. *Driefontein Consolidated Mines*, [1902] A.C. 484.

(*e*) The extent of British territory: *The Fagernes*, [1927] P. 311.

[1] P. 186, *post*.

[2] In the event of the cession of the territory of a Dominion the approval would be given by the Parliament of the Dominion.

[3] There is no general rule of international law that a treaty needs formal ratification. This depends upon the terms of each treaty; see "Do Treaties need Ratification?" by G. G. Fitzmaurice, in *British Year Book of International Law*, 1934.

Recognition.

The question of the recognition or status of a foreign State is one for international law, but the fact of recognition may have an important bearing on the result of litigation in which a British subject is engaged. In *Aksionairenoye Obschestvo, A. M. Luther* v. *J. Sagor & Co., Ltd.* (*ante*), the recognition of the Soviet Government as a *de facto* government caused the Court of Appeal to find for the defendants, although it was expressly stated that the decision of the lower court in favour of the plaintiff was correct because at the time that it was given the Soviet Government had not been recognised by the British Government. The title of the defendants depended upon a confiscatory act by the Soviet Government in Russia. Once the Soviet Government had been recognised, the validity of its decrees could not be impugned.[1]

Status.

In *Duff Development Co.* v. *Government of Kelantan* (*ante*), the House of Lords reaffirmed that it had

> for some time been the practice of the courts to take judicial notice of the sovereignty of a State and for that purpose (in any case of uncertainty) to seek information from a Secretary of State; and when such information is so obtained, the court does not permit it to be questioned by the parties.

Diplomatic Status.

In *Engelke* v. *Musmann* (*ante*) a statement made at the invitation of the court by the Attorney-General on the instruction of the Foreign Secretary as to the status of a person claiming immunity from process in the civil courts by reason of diplomatic privilege was accepted as conclusive. Such immunity is enjoyed by virtue of local municipal law which adopts the rules of international law, and it is for the court to determine whether such immunity shall be enjoyed by the person claiming it. But the fact of a person holding a position which would entitle him to diplomatic immunity is peculiarly within the knowledge of the Foreign Office, and the statement of that fact by or on behalf of the department is regarded by the courts as conclusive. There was no attempt in this case by the Foreign Office to interfere in the litigation; it merely furnished a record of what had been done by virtue of prerogative powers in recognising the diplomatic status of one of the parties, apart altogether from the litigation in question,.

Existence of War.

In *Janson* v. *Driefontein Consolidated Mines* (*ante*), the plaintiff's right to recover depended upon whether war had broken out before his loss occurred. The declaration of the Executive upon this point was accepted as conclusive. "By the law and custom of this country the Sovereign alone has the power of declaring war and peace": *The Hoop* (1799), 1 C. Rob. 196, *per* Lord Stowell, at p. 199. It follows that it is for the Crown to determine whether

[1] *Cf.* p. 40, *ante.*

war exists: *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S. Co., Ltd.*, [1939] 2 K.B. 544.

Extent of British Territory.

In *The Fagernes*, [1927] P. 311, the Court of Appeal accepted the Attorney-General's statement, made on the instructions of the Home Secretary, that a place where a collision at sea had occurred was not claimed to be within the limits to which His Majesty's jurisdiction extended. The collision occurred in the Bristol Channel several miles from the nearest land. The effect was to non-suit the plaintiff.

Reprisals.

More complicated is the acceptance by the courts of declarations by the Executive in regard to reprisals in time of war. By international law every belligerent must establish a prize court to determine claims in regard to captured ships (and aircraft). Prize courts in this country are governed by statutes, though they may be established under the prerogative. A prize court administers international law. A British prize court is bound by an Act of Parliament but not by an Order in Council purporting to enlarge the rights of the Crown, though it will regard an Order in Council modifying those rights: [1] *The Zamora*, [1916] 2 A.C. 77. The Crown may by Order in Council recite facts showing that a case exists for reprisals (additional restrictions over and above those normally sanctioned by international law). A prize court will accept as conclusive the facts recited, and will give due weight to an Order in Council as showing what in the opinion of the Executive is the only means of meeting an emergency, but this will not preclude the right of any party to contend or the right of the court to hold that the reprisals taken are unlawful as entailing on neutrals an unreasonable degree of inconvenience: *The Zamora*, (*ante*).

[1] *Cf.* the right of the Crown to grant a licence to trade with the enemy: *The Hoop*, (*ante*).

CHAPTER 10.

PUBLIC BOARDS AND OTHER GOVERNMENTAL AGENCIES.

No account of the present-day machinery of government would be complete without some consideration of:—

(i) the many statutory and other authorities with executive and regulatory functions of government which for various reasons are not directly under the control of a Minister answerable to Parliament for their administration;

(ii) the large number of bodies with advisory functions which are associated with the work of government departments.

A.

Boards and Commissions with executive and regulatory Functions.[1]

History.

To modern eyes accustomed to the functions of government being entrusted to great departments of State presided over by Ministers, the existence of public bodies charged with similar functions, but operating under a board or commission rather than as part of a department, is apt to be regarded as anomalous. Independent organs of government have, however, a long history. In the eighteenth century, when central control had been weakened through the curtailment of the powers of the Privy Council in the preceding century, there were innumerable bodies of commissioners created by statute, as often as not by private Acts, which enjoyed limited but autonomous powers for such purposes as police, education, paving, lighting, and improvements of various kinds. They indulged freely in experiments and developments which were sometimes extra-legal. They were free from any effective administrative control by the Central Government; and the cumbersome control which could have been exercised through the courts by the prerogative writs was seldom invoked. These bodies were essentially local in character. It was not until after the Reform Act, 1832, that there emerged a few notable experiments in autonomous administration covering the whole country. With the passing of the Reform Act ministerial responsibility, as it is understood today, began to take shape. Yet two years later, as a result of the

[1] For this subject see Cushman, *Independent Regulatory Commissions* (Oxford University Press); *Public Enterprise* (edited by W. A. Robson) (George Allen and Unwin).

Report of the Poor Law Commission, there was set up one of the most striking experiments in the administrative field without such responsibility. The Poor Law Commissioners, the Three Kings of Somerset House, enforced upon the local administration of poor law relief strict central control by means of orders and an inspectorate. No Minister answered for them in Parliament. This is not the place to discuss the history of this short-lived experiment, nor that of other examples taken from the nineteenth century, such as the General Board of Health or the Railway Commissioners. Non-departmental Boards formerly found favour in Scotland, and in greater variety in Ireland before 1920. In the early years of the present century the Insurance Commissions and the Road Board afford examples of this type of organisation in the United Kingdom. It is noticeable that the fate of most such bodies has in the past been that their functions eventually have been transferred to a government department.

Reasons for recent Developments.

The years between the wars saw great activity in this field of governmental machinery; and with a renewal of the demand from some quarters for nationalisation of public utility services and of banking and industry, the constitutional consequences of entrusting functions to bodies which are not directly responsible to Parliament require examination. So far as it is possible to generalise, recent developments may be said to be due to two motives: (1) the desire to keep a service, and particularly one which is concerned with the administration of State benefits, as far removed from the political scene as possible; (2) the opposition to State intervention in the form of full-scale nationalisation of public utility services or basic industries. The independent authority is a compromise designed to avoid political fluctuations in the one case and the rigours of bureaucratic control in the other. There are, however, some further reasons why experiments have been made in this field. Thus concentration, particularly at high level, on a particular activity is easier to achieve in the case of an independent board concerned with the administration of a single functional activity than it can be in a government department dealing with several functions. Decisions at the top can be more quickly taken and are less liable to be changed by subsequent political fluctuations. Again, the device is a convenient means of securing uniform administration in a field which within the departmental machine is the responsibility of different Ministers in each part of the kingdom, as is the case with agriculture. A board too may be the means of preventing the overloading of the departmental organisation or, in the alternative, the increase in the already formidable number of departments. Fuller use may be made of expert knowledge in a particular field if the responsibility is concentrated in a small body of persons experienced in that

field who are not under ministerial direction, at all events as regards day-to-day administration.

The Problem of Ministerial Control.

But, whatever the motives for their creation or the advantages which may accrue in administrative convenience and efficiency, it is necessary for the constitutional lawyer to watch the growth of these experiments in relation to their cumulative effect on ministerial responsibility for national policy. There is little doubt that these agencies have their part to play in modern government, provided that each operates in a clearly defined field. But should they encroach upon matters of national policy which ought to be determined by Ministers directly responsible to Parliament? If the answer is No—and our tradition suggests that answer—then it is important to retain some form of direct control by Ministers over the policy-making activities of these agencies. This does not mean that for every act of day-to-day administration the Minister should be responsible, but that a general power of direction should be retained and that the board should not be irresponsible in the realms of policy and finance.

Assistance Board.

To illustrate the problem the centralised administration of unemployment assistance by the Assistance Board since its creation in 1934 may be considered. The Board is an independent body of six members, of whom only the chairman and deputy-chairman receive salaries (£5,000 and £3,000 a year respectively) as whole-time officers. It is the duty of the Board to administer relief to persons insured under the unemployment insurance scheme who have fallen out of statutory benefits;[1] the Board has discretionary powers as to the scale of allowances, which can, however, only be altered with the approval of Parliament, which is given by affirmative resolution of each House; Parliament can reject but cannot amend the regulations laying down the scale. The Minister of Labour is not in law entitled to interfere with the day-to-day administration of the Board, which is conducted by its officers, nor can he direct its decisions. He receives an annual report from the Board which it is his duty to present to Parliament, and to defend if debate ensues. The Minister is not, however, responsible for decisions of the Board's officers in individual cases of relief. For these there is provided an appeal tribunal whose function is quasi-judicial. The regulations of the Board are laid in draft before Parliament by the Minister, together with his reasons for differing from the proposals, should such a situation arise. Thus, in a field where highly controversial political issues arise, the Minister occupies an ambiguous position in relation both to the Board and to Parliament.

Considerations of Responsibility.

It must be emphasised that this illustration is not typical. Indeed

[1] The Board also administers the scheme of payments supplementary to the contributory State pensions.

it would be misleading to regard it as anything more than an empirical essay into an uncharted field. Nevertheless after a stormy start the Board has worked well in conditions which hitherto have been favourable to its operations. Whether it could survive a long period of substantial unemployment is doubtful. It is perhaps more profitable to suggest some of the considerations which have to be taken into account in order to reconcile independent authority with ministerial responsibility, since it is undesirable to lay down rules for the operation of institutions where flexibility and variety are essential if the practical aim for their establishment is to be achieved.

1. In general the public interest should be represented by a Minister who is responsible to Parliament for broad policy.

2. There should be as little interference as possible by the Minister with day-to-day administration.

3. The Minister should be required to approve general schemes and regulations and should have power to issue directions on general policy.

4. Where a board is financed from public funds, financial control is required in the form of approving capital expenditure and annual estimates. Even where a board is not dependent on public funds, such control is desirable, if its operations are conducted without responsibility to the general public who subscribe to its capital funds.

5. To compensate for the measure of independence from day-to-day ministerial control, appointments to boards and commissions, whether by the Minister or not, should include persons of high standing who can exercise a detached and impartial judgment. They should not normally be confined to persons expert in the special work of the independent authority.

6. Mutual confidence between the Minister ultimately responsible and the members of the authority is required. This can be attained by staggering vacancies at fixed intervals, thus ensuring continuity of association between the authority and the Minister and his department.

7. There should be a means of resolving deadlocks between the Minister and the authority. Perhaps this can only be a power of dismissal, though its exercise save in the last resort would destroy the independence of the authority.

Types of Independent Authorities.

This is not the place to attempt any classification of independent agencies. It may, however, help to an appreciation of the constitutional problem if some examples are given of the kind of function which has been entrusted to such bodies. It is only by surveying the field that any conclusion can be drawn whether or not their existence tends to the establishment of a fourth arm of government, charged. like the departments, with administrative functions.

In the first place there are a limited number of purely governmental services which make discretionary payments out of public funds. Such are the Assistance Board and the War Damage Commission, which, while subject to Treasury direction in general matters, exercises a wide discretion whether the owners of buildings destroyed or damaged by enemy action shall receive a value payment or a sum based on the cost of the work of restoration or repair.

In a comparable category are the authorities, such as the British Council and the Council for the Encouragement of Music and the Arts,[1] which receive grants from public funds to expend at their discretion on cultural activities. Arguments which are valid for condemning the use of agencies not responsible to Parliament in a field so susceptible of political controversy as unemployment relief cannot be readily sustained against their use where questions of taste are paramount. So far as the British Broadcasting Corporation is an organ for entertainment and culture it belongs to this category.

Another group of agencies has been entrusted with the operation of public utility services or the management on a national scale of an industrial enterprise. The Central Electricity Board which operates the grid system of electricity generation; the British Overseas Airways Corporation and the other two corporations which are to divide between them the operation of the main air transport routes overseas; the Coal Commission, so far as it is vested with the ownership of minerals; the Forestry Commission;[2] the London Passenger Transport Board, and the Port of London Authority, all have this feature in common, that they are monopolies or quasi-monopolies controlled as regards their day-to-day administration and finance neither by a Minister of the Crown nor a body of shareholders.

The fourth and last group is the most diversified. It is concerned with a variety of economic controls of enterprises, the ownership of which remains in private hands. Of these the agricultural marketing boards have attracted most attention. These are organisations, of the guild type, set up for the internal regulation of production with a view to saving an industry from financial decline. They have been criticised on account of their price-fixing powers, since the consumer is unrepresented, and by reason of their disciplinary jurisdiction over the producers, whose membership is compulsory. Other bodies are concerned more with planning and reorganisation, though they usually possess additional functions of an executive character. Such are the Electricity Commissioners,

[1] Title changed in 1945 to: Arts Council of Great Britain.

[2] By the Forestry Act, 1945, this Commission was placed under the direct responsibility to Parliament of the Minister of Agriculture and Fisheries and Secretary of State for Scotland.

who preceded the Central Electricity Board by six years, the Livestock Commission, the White Fish Commission and the Cotton Industry Board. Bodies whose functions are purely or mainly administrative are the Wheat Commission, the Sugar Commission, the Cotton Industry Board (as regards some of its functions). Finally under this heading come a number of licensing, registration and rate-fixing bodies, exercising powers of a quasi-judicial character, such as the Area Traffic Commissioners who license operators of public service vehicles and approve the routes for such vehicles, and the Railway Rates Tribunal,[1] an expert body presided over by a lawyer, which is concerned with fixing railway charges, a task which is neither wholly administrative nor judicial.

No doubt there will be many experiments in this field in the immediate future and other questions will have to be answered besides that of the degree of ministerial control. One perhaps should be mentioned here—whether the public interest can be served if in addition to the Civil Service and the local government service there exists a third form of public service, what may be called the public corporation service, which at present, while too diversified to be called a separate service, enjoys greater freedom with regard to recruitment and conditions of service than the two older services. Lawyers too will be concerned with the legal status of such a service, which at present possesses no special privileges.

B.

Advisory Bodies.[2]

Why consultation is needed.

To secure observance a law must command consent of the governed. To secure that consent a freely elected House of Commons passes the law. Neither Parliament nor the government department which is charged with the duty of preparing a Bill or regulations are necessarily, or even usually, in a position to decide of their special knowledge what detailed provisions, or in some cases what general policy, will command acceptance.

It is for a Minister, having consulted the Cabinet when important questions of policy arise, to determine what shall be the contents of a Bill. It is for him to explain and justify the contents, clause by clause, accepting modifications, maybe, in the course of its passage through Parliament. It is, however, but rarely that Parliament rejects a Bill because it cannot accept the general principles which are contained in the legislation. Indeed, no Government could long survive if this happened. It is important, therefore, to con-

[1] See Part VII., Chap. 6, *post.*

[2] *Advisory Bodies*, edited by R. V. Vernon and N. Mansergh (Allen and Unwin) contains a comprehensive account of the various consultative bodies.

consider briefly some of the means whereby information is obtained by a Government to enable it to perform its duty of preparing legislation.

Royal Commissions and Departmental Committees.

When it is apparent that a change in the law is desirable and the issue is one which the Government considers requires preliminary enquiry, it is usual to appoint a departmental committee, or, if the matter is of high import and time is not of the essence, a Royal Commission, to enquire into the matter and to report to the Government on all aspects of the problem. The former method is usually followed, but the latter naturally enjoys greater prestige. To illustrate from recent examples, the vital issue of the causes of a declining birth-rate has been referred to a Royal Commission on Population, with the object of advising on long-term policy. The pressing need to investigate the conditions under which there are cared for children who lack parental care is under enquiry by a departmental committee. While a Royal Commission is appointed by royal warrant, and a departmental committee by a Minister, in either case the personnel to conduct the enquiry is selected by the departments most closely concerned with the proposed legislation. Members are chosen, partly from their record of public service, partly by reason of their knowledge of the problem under investigation. They are drawn mainly from outside the ranks of government servants.

When the investigating body has delivered its report, it is for the Minister, or the Government as a whole, to decide how far the recommendations are acceptable and, if so, in what form they should be presented to Parliament. The function of an extra-governmental body is purely advisory, and this is equally true of the consultative committees to which reference may now be made.

Consultative Committees.

The practice of consultation with extra-governmental organisations has grown rapidly in the present century. It is inevitable that the increase in the functions of government should have made the need for expert advice felt by the administrator. Nor is the need confined to projected legislation, though consultative committees have proved particularly valuable in the task of framing regulations. The function of such committees is to enable the Minister to ascertain informed opinion before he comes to a decision, whether that decision involves an executive or a legislative act. In some cases there is a statutory obligation on a Minister to consult a standing committee or named association, though it is seldom that the advisory body can take the initiative without the matter being referred to it by the Minister. The majority of these bodies are, however, appointed at the discretion of a Minister, because he feels the need for advice. Under this heading come most of the committees associated with the Ministry of Health, which between 1919 and 1938 numbered 125.

Examples of Consultation.

An illustration of the type of body which a Minister must consult is the Police Council. Regulations relating to conditions of service in the police forces can only be made, under section 4 of the Police Act, 1919,[1] after the Home Secretary has consulted the Council, a body constituted under the Act, on which sit representatives of local police authorities and of all ranks of the police. The Education Act, 1944, required the Minister of Education to establish central advisory councils for education, one for England and one for Wales, to advise not only on any questions referred to them by the Minister, but also upon any matters of educational theory and practice as the councils think fit. The Education Councils replace the Consultative Committee of the former Board of Education, a body which, though lacking the power to take the initiative, made reports at the request of the President of the Board, upon which were based, first the reorganisation of primary education, and later the expansion of secondary education which is intended to raise the status of modern and technical schools to an equality with county secondary and grammar schools. Thus consultative bodies influence fundamental reforms, as well as serving as a source of expert knowledge on technical matters. Research and the collection of information are important functions for which departments need the assistance of outside organisations. As yet it is only tentatively that the device has been applied to the field of private law, but the Law Revision Committee,[2] first appointed by the Lord Chancellor in 1934, and his committee on the law of defamation (1939) mark a beginning of what may become a systematic advisory service to secure a continuous watch on anomalies in the common law and in equity.

[1] P. 164, *ante*.

[2] P. 213, *ante*.

PART V.

THE JUDICIARY.

The Machinery of Justice, by R. M. Jackson (Cambridge University Press).
History of English Law, especially Vol. I., by Sir W. S. Holdsworth (Methuen), for reference.

CHAPTER 1.

THE COURTS.

Justices of the Peace.

MAGISTRATES, or justices of the peace, are appointed in each county, and for each borough which has its own commission of the peace,[1] by the Crown on the recommendation of the Lord Chancellor, who is advised as to counties by the Lord-Lieutenant, with the assistance of an advisory committee, and as to boroughs by separate advisory committees. Men and women are eligible. They are not paid for their services. They perform many judicial and some administrative duties. Any court of summary jurisdiction consisting of two or more justices sitting in a Petty Sessional Court-house forms a Court of Petty Sessions. Juvenile courts for the trial of young offenders are constituted from special panels of suitably qualified justices appointed by justices of each Petty Sessional Division out of their own number. A juvenile court consists of not more than three justices drawn from the panel, and must hold its sittings at a different time from those of the ordinary summary court or preferably in a different room. Domestic proceedings [2] are also tried by not more than three justices, of whom one should be a man and one a woman. The hearing of domestic proceedings is separated from other business and, as in juvenile courts, the public is excluded. In the metropolitan police district of London the courts are presided over by paid metropolitan magistrates, and many of the larger towns in the provinces have paid stipendiary magistrates. They are appointed by the Crown on the recommendation of the Home Secretary. There is no retiring age for justices of the peace, but it is the present practice by the terms of their appointment to require metropolitan magistrates to retire at seventy, subject to a possible extension for two years. When a justice of the peace is

[1] P. 232, *post*.
[2] Proceedings under the Guardianship of Infants Acts, and separation and maintenance proceedings.

incapacitated by age or infirmity or some other reason, the Lord Chancellor may place his name on a supplemental list. Justices whose names are on the supplemental list may not take part in judicial business.[1]

Minor Offences.

Innumerable minor offences are tried by magistrates exercising summary jurisdiction in Petty Sessional Courts. A large number of more serious indictable offences (mainly stealing and other offences under the Larceny Act, 1916) can also be tried summarily should the accused desire it and the magistrates consider it expedient. Conversely, where an offence triable summarily is punishable with more than three months' imprisonment, the accused may elect to be tried by a jury at Quarter Sessions. Petty Sessional Courts also conduct preliminary enquiries into indictable offences to determine whether or not an accused person should be committed for trial.[2] All offences, other than homicide, committed by young persons under seventeen may be tried summarily.

Coroner's Court.

A coroner's court, which conducts enquiries (inquests) into the cause of violent or unnatural death or where the cause of death is unknown, may commit for trial on a charge of homicide.

Appeals from Magistrates.

From the justices sitting in County Petty Sessions an appeal lies to the justices of the whole county sitting in Quarter Sessions, or from Borough Petty Sessions to Borough Quarter Sessions sitting with the Recorder as sole judge. Such an appeal is a re-hearing of the case. The prohibitive cost to the appellant of such appeals led to the passing of the Summary Jurisdiction (Appeals) Act, 1933. This Act provided that in fixing the amount of recognisances to be entered into by appellants account shall be taken of their means and that such recognisances shall merely be conditioned to prosecute the appeal and not to pay costs, and further provided for the granting of legal aid both to appellants and respondents. Means are also to be taken into account when a party is ordered to pay costs. Appeals to County Quarter Sessions are heard by a standing committee of justices having special qualifications with a chairman appointed annually. From Quarter Sessions a further appeal lies on a point of law by means of a case stated for the opinion of the King's Bench Division of the High Court, or a case may be stated by the justices in Petty Sessions without any preliminary appeal to Quarter Sessions. Such appeals are heard by a Divisional Court of three judges of the King's Bench Division.

Suggested Reforms.

The value of associating laymen with the administration of justice and the resulting economy to the State is obvious. It is, however, by no means certain that these considerations outweigh the defects

[1] Justices (Supplemental List) Act, 1941.
[2] A single justice may commit for trial.

of justices' justice. Many benches of magistrates are efficient and fair, but many are rightly criticised. There is too great a readiness to accept police evidence, and decisions of the bench are often the decisions of the clerk, who, though sometimes a whole-time official, is often a solicitor in private practice and sometimes has but small qualifications for his post. It is true that the majority of persons elect to be tried summarily rather than to await trial at Quarter Sessions by a jury, but this can be chiefly attributed to the natural desire to avoid delay. Lay magistrates are perhaps too aware of local prejudices and personalities, and it might be that the advantages of lay justice would best be preserved by associating with lay magistrates paid legal chairmen of Petty Sessional Courts. Suggested reforms are the appointment of whole-time clerks serving areas formed by grouping county divisions and the smaller boroughs into areas that can conveniently be served by a whole-time clerk,[1] and possibly the substitution of paid stipendiary magistrates for unpaid justices. This last proposal would, however, involve great expense, in addition to losing the value of the association of laymen with the administration of law.[2]

County Courts.

County Courts, the chief lower courts for the trial of civil disputes, are presided over by a paid judge appointed by the Lord Chancellor, sitting usually alone, but sometimes with a jury. The qualification for appointment is at least seven years' standing as a barrister. An appeal lies to the Court of Appeal ; Administration of Justice (Appeals) Act, 1934. County Court judges retire at seventy-two, with an extension to seventy-five at the discretion of the Lord Chancellor. County Court jurisdiction[3] is local and limited. In general, only those cases can be tried in the County Court in which the amount involved does not exceed £200, but there are many exceptions to this rule. Where cases are brought in the High Court which could have been brought in the County Court, there are provisions penalising the plaintiff in costs.

City of London Courts.

The Court of Aldermen[4] appoints the Recorder of London who acts as a judge of both the Central Criminal Court and the Mayor's and City of London Court. The appointment of the Recorder must be approved by the Crown before he can exercise his judicial functions. The Mayor's and City of London Court is the County Court for the City. It is an amalgamation of two courts, the Mayor's Court with a jurisdiction unlimited as to amount and

[1] *Report of the Departmental Committee on Justices' Clerks*, 1944, Cmd. 6507.

[2] For criticism of Magistrates' Courts and suggested reforms, see Jackson, *op. cit.*, pp. 129–49.

[3] For account of County Court jurisdiction, see Jackson, *op. cit.*, pp. 25–30.

[4] Part VI., Chap. 2, D.

the City of London Court, a court for small cases. There sit as judges, in addition to the Recorder, the Common Sergeant and two judges of the City of London Court, one of whom is also a judge of the Central Criminal Court. Appeals lie to the Court of Appeal.

Borough Courts.

Certain boroughs have ancient courts which exercise civil jurisdiction. Their jurisdiction is sometimes larger in regard to amount than that of the County Court. The most important are the Liverpool Court of Passage, the Salford Hundred Court and Bristol Tolzey Court. Appeals from the Court of Passage and Salford Hundred Court lie direct to the Court of Appeal; from other borough courts appeals lie to the King's Bench Division.

Criminal Courts Quarter Sessions.

Charges of treason, felony and misdemeanour are triable on indictment (formal written accusation). Indictable crimes are tried with a jury at Quarter Sessions or Assizes or at the Central Criminal Court. Some of the gravest crimes may not be tried at Quarter Sessions. Conversely, as has been seen, some of the less serious indictable crimes may be tried summarily.[1] Quarter Sessions may transmit to Assizes any case which it considers should more properly be tried at Assizes owing to the gravity of the charge, or the difficulty of the point of law involved. A County Quarter Sessions may apply to the Lord Chancellor for the appointment of a chairman and deputy-chairman with legal qualifications (a barrister or solicitor of ten years' standing), to whom a salary may be paid. Quarter Sessions presided over by a chairman or deputy-chairman so appointed, or who has held judicial office as defined in the Administration of Justice (Miscellaneous Provisions) Act, 1938, may try certain crimes which must normally be tried at Assizes.[2] Out of sixty-two Courts of County Quarter Sessions the chairmen of fifty-six and the deputy-chairmen of thirty-two possess legal qualifications as required by statute to justify extended jurisdiction. The Quarter Sessions of those boroughs which have their own Courts of Quarter Sessions are presided over by a Recorder, a salaried barrister, as sole judge.[3]

Assizes.

Criminal cases committed to Assizes are tried by petty juries before judges of the King's Bench Division travelling the seven circuits into which England and Wales are divided. These Courts of Assize are branches of the High Court of Justice. The judges trying criminal cases on circuit derive their authority from commissions of oyer and terminer and general gaol delivery. The former gives power to try all prisoners against whom an indictment

[1] P. 196, *ante*.
[2] For criticism of this legislation, see Jackson, *op. cit.*, p. 89.
[3] P. 232, *post*.

may be preferred; the latter gives power to try all prisoners in gaol or who have been released on bail. These commissions are sometimes issued to King's Counsel and other Special Commissioners who are not judges of the High Court. Assizes are normally held three times a year in each county and in a few large towns which have their own Assizes. In Manchester, Leeds and Liverpool the Assizes are held four times a year. At the Winter and Summer Assizes civil business is taken as well as criminal, but except in a few large towns the Autumn Assize is confined to criminal business. Judges taking civil business at Assizes derive their authority from Commissions of Assize and have the unlimited jurisdiction of the High Court, but the jurisdiction of the Chancery Division is scarcely ever exercised by the Assize Judges. Divorce, but not as a rule Probate or Admiralty jurisdiction is exercised at Assizes and judges of the Probate, Divorce and Admiralty Division may go on circuit for that purpose.

Central Criminal Court.

The Central Criminal Court at the Old Bailey acts as the Court of Assize for criminal business for London, Middlesex and part of the Home Counties. The judges are the judges of the King's Bench Division, one of whom in rotation attends each of the monthly sessions of the Court, the Recorder of London, the Common Sergeant, and a judge of the City of London Court.

Criminal Jurisdiction of King's Bench Division.

The King's Bench Division of the High Court of Justice also possesses criminal jurisdiction. This jurisdiction is mainly supervisory and derived from the ancient Curia Regis. Certain offences of a special nature, *e.g.* crimes committed abroad by public officials, are tried in the King's Bench Division, unless the High Court (acting through the King's Bench Division) directs trial at the Central Criminal Court. The King's Bench Division can also try a misdemeanour in respect of which an ex-officio information [1] (a complaint in writing) has been filed by one of the Law Officers.[2] Where owing to local prejudice it is impossible to secure a fair trial, the King's Bench Division may direct that a case be tried either at the Central Criminal Court or some other court of Assize or Quarter Sessions than the court which would otherwise have jurisdiction. The King's Bench Division may by an order of certiorari [3] quash for an error of law the proceedings of Quarter Sessions or any inferior tribunal. Cases of grave importance are sometimes removed into the King's Bench Division in order to secure a trial at bar before three judges (usually with a special jury), as when Sir Roger Casement was tried for treason in 1916.[4] A trial may be ordered before three judges

[1] Kenny, *Outlines of Criminal Law*, 15th ed., by G. Godfrey Phillips (Cambridge University Press), p. 543.
[2] P. 149, *ante*.
[3] Part VII., Chap. 4.
[4] *The King* v. *Casement*, [1917] 1 K.B. 98.

of the King's Bench Division sitting at the Central Criminal Court instead of a trial at bar in the King's Bench Division. The original, as opposed to the supervisory, jurisdiction of the King's Bench Division, is rarely exercised.

Preliminary Enquiries; Grand and Petty Juries.

With the exception of summary offences tried at Petty Sessions all criminal cases are tried by a jury. Such juries are known as petty juries and consist of twelve persons.[1] Almost all criminal proceedings in respect of indictable crimes (other than those tried by consent at Petty Sessions) begin with a preliminary enquiry by magistrates, before whom an information is laid either by the police or a private prosecutor. It is the duty of the magistrates holding the preliminary enquiry to decide whether or not there is a case to go to trial. It is also for the magistrates to decide whether to commit the accused to Assizes or Quarter Sessions where both have jurisdiction. Magistrates may not commit to Assizes a case triable at Quarter Sessions, unless they are of opinion that the case is unusually grave or difficult or that serious delay or inconvenience would result from committal to Quarter Sessions. There is also power to avoid delay by committal to the Assizes or Quarter Sessions of an adjoining county. Until 1933 committal for trial by a magistrate was followed by the presentation of a bill of indictment to a grand jury of not more than twenty-three nor less than twelve "good and loyal men" of the county—in practice justices of the peace and others of standing—selected by the Sheriff. The grand jury dated from the presentment of accused persons initiated by the Assizes of Clarendon (1166) and Northampton (1176). If the grand jury considered that there was a *prima facie* case to answer, they found a true bill and an indictment was presented to the petty (or trial) jury. Though regarded by some as a valuable constitutional safeguard, it was considered as an unnecessary waste of time and money that the careful investigation before magistrates should be followed by a further and necessarily less thorough enquiry by a grand jury. By the Administration of Justice (Miscellaneous Provisions) Act, 1933, grand juries were abolished, except, the grand jury of London and Middlesex, for certain purposes, *e.g.* the presentation of indictments for offences committed abroad by public officials.[2] An indictment may now be presented to a petty jury either (*a*) where the prisoner has been committed for trial by a magistrate, or in the case of a murder or manslaughter by a coroner's court,[3] or (*b*) where a direction or consent of a judge of the

[1] Since 1939 on account of war a jury need not consist of more than seven persons except in trials for murder or treason or where the court rules otherwise owing to the gravity of the matters in issue: Administration of Justice (Emergency Provisions) Act, 1939.

[2] See note 7, p. 364, *post*.

[3] P. 229, *post*.

High Court has been obtained, or (*c*) by order of the judge of any court in which the prisoner is suspected to have committed perjury.

Court of Criminal Appeal.

From both Assizes and Quarter Sessions an appeal lies against conviction or sentence (but not against acquittal) to the Court of Criminal Appeal. This court, which consists of the Lord Chief Justice and the judges of the King's Bench Division, is usually constituted by three judges, the minimum number required by statute. A single judgment of the court is delivered. Appeal lies to it as of right on a question of law, and by leave of the court itself or of the trial judge on a mixed question of law and fact or against sentence. There is no power to order a new trial. From the Court of Criminal Appeal an appeal lies, either by the Crown or by the accused, to the House of Lords on a point of law certified by the Attorney-General to be of special public importance.

Superior Civil Courts before 1875.

Civil cases outside the jurisdiction of the County Courts are tried in the High Court of Justice, including the Assize Courts. There were, before 1875, several superior courts, each with its own special province, though between the three Common Law Courts there was much overlapping. The Common Law Courts were the Court of King's Bench, originally concerned with offences against the King's peace, the Court of Common Pleas for the trial of cases between subjects and the Court of Exchequer for the trial of matters touching the revenues of the Crown. Both the Court of King's Bench and the Court of Exchequer had invaded the original province of the Court of Common Pleas. There were also the Court of Chancery, exercising the equitable jurisdiction of the Chancellor, the Admiralty Court, the Court of Probate and the Court of Divorce and Matrimonial Causes, and the Chancery Courts of the Counties Palatine of Lancaster and Durham. The Court of Appeal from the three Common Law Courts was the Court of Exchequer Chamber.[1] Chancery appeals immediately prior to the Judicature Act went to two Lords Justices in Chancery, sitting with or without the Lord Chancellor.

Judicature Act, 1873.

By the Judicature Act, 1873 (now the Supreme Court of Judicature (Consolidation) Act, 1925), all these Courts (except the two Palatine Courts) and the Courts of Assize were amalgamated into the Supreme Court of Judicature, consisting of the Court of Appeal and the High Court of Justice. The Act was chiefly directed to the reorganisation of court machinery. So far as the substantive law was concerned it made, with a few exceptions, no change. The High Court of Justice was divided into five Divisions: Queen's Bench; Common

[1] The judges of the two Common Law Courts other than the court from which the appeal came, *e.g.* King's Bench appeals came before the judges of the Common Pleas and Exchequer.

Pleas; Exchequer; Chancery; Probate, Divorce and Admiralty. These Divisions have now been reduced to three: King's Bench; Chancery; Probate, Divorce and Admiralty. The jurisdiction of the High Court is unlimited as to amount. Judges of the High Court are appointed by the Crown, on the recommendation of the Lord Chancellor. They must be barristers of at least ten years' standing. There is no retiring age.

High Court Judges.

The number of puisne judges (judges of the High Court other than the Lord Chancellor, Lord Chief Justice and Master of the Rolls) must be not less than twenty-five[1] nor more than thirty-two. A puisne judge must be a barrister of at least ten years' standing. Unless the number falls below twenty-five, the King may not be advised to fill a vacancy unless the Lord Chancellor with the concurrence of the Treasury[2] advises that the state of business requires that the vacancy should be filled. A judge of the High Court is attached to such Division as the Lord Chancellor may direct, but not less than seventeen judges must be attached to the King's Bench Division, not less than five to the Chancery Division, and not less than three to the Probate, Divorce and Admiralty Division. The Lord Chancellor may with the consent of the judge concerned transfer a judge from one Division to another, but no judge may be transferred from the King's Bench Division without the consent of the Lord Chief Justice, who presides over that Division, or from the Probate, Divorce and Admiralty Division without the consent of the President of that Division.

King's Bench Division.

The King's Bench Division is concerned with every class of common law action, in addition to its criminal and appellate jurisdiction and its power to supervise inferior courts and judicial bodies by means of the prerogative orders which will be discussed later.[3] It exercises the jurisdiction of the three former Common Law Courts. It acts as the Assizes for London and Middlesex, so far as civil business is concerned, and countless cases are tried in London in the King's Bench Division which might equally be tried on circuit at Assizes. It is for a Master[4] or District Registrar[5] of the High Court to decide whether an action shall be tried in London or at Assizes. Cases in which many local witnesses are concerned are best tried in the county in which the dispute arose. Trials take place both before a judge and jury, and before a judge

[1] During the war vacancies need not be filled unless the state of business so requires: Administration of Justice (Emergency Provisions) Act, 1939, s. 10.

[2] The necessity of Treasury concurrence has been criticised as an infringement of the independence of the Judiciary.

[3] Part VII., Chap. 4, and Part VIII., Chap. 1.

[4] Masters are officers of the court who deal with the preliminary stages of an action.

[5] These carry out the duties of Masters in certain provincial towns.

alone. There is a right to a jury in cases involving charges of fraud or in cases of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, unless there is involved a prolonged investigation of accounts or documents or a scientific or local investigation which cannot conveniently be made with a jury, but in all other cases it is for the court in its discretion to decide whether trial shall be by a jury or by a judge alone.[1] Juries in civil cases are either special juries or common juries. Special jurors have a higher property qualification. In cases tried with a jury matters of law are for the judge, matters of fact are for the jury.[2]

Chancery Division.

The old Court of Chancery exercised the equitable jurisdiction of the King's Chancellor, delegated to him by the King in Council. This jurisdiction supplemented the common law by granting new remedies and dealing also with matters of which the common law courts took no cognisance. Equity, originally an elastic system for meeting hard cases, had developed an important body of law almost as fixed as the common law. As a result of the Judicature Act any judge of the High Court may sit in any Division, and any Division may give any remedies available, whether they are based on the common law or on equity. Each Division, however, has in practice its own particular business, and to the Chancery Division there are specifically assigned those matters formerly dealt with by the courts of equity. They include partnerships, mortgages, trusts, the specific performance of contracts and the administration of the estates of deceased persons. Company business also is administered by the Chancery Division. There is also assigned to this Division the bankruptcy business of the High Court. The Lord Chancellor, who is President of the Supreme Court of Judicature, though still nominally president of this Division, has long ceased to sit. The Chancery Courts of Lancaster and Durham have a jurisdiction over Chancery suits which is limited as to area but unlimited as to amount. An appeal lies from them direct to the Court of Appeal.

Probate, Divorce and Admiralty Division.

The business of the Probate, Divorce and Admiralty Division presided over by the President of that Division is apparent from its name. On the Admiralty side it exercises the jurisdiction of the old Court of Admiralty, and is concerned with maritime matters [3] and

[1] Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 6. Since 1939, on account of war, trial by jury is abolished in civil cases, unless the court certifies that a jury is desirable.

[2] For merits and defects of trial by jury, see Jackson, *op. cit.*, pp. 218–32.

[3] Actions relating to the carriage of goods by sea are usually tried in the King's Bench Division in what is known as "The Commercial Court," *i.e.* before a judge appointed to try commercial cases. The procedure is simple and speedier than that ordinarily employed in the King's Bench Division.

particularly collisions at sea. On the probate side it takes the place of the Court of Probate, which in 1857 took over from the ecclesiastical courts the granting of probate of wills and letters of administration. On the divorce side it grants the matrimonial remedies formerly granted by the Court for Divorce and Matrimonial Causes. Until 1857 the ecclesiastical courts could grant decrees of judicial separation, but could not dissolve marriages. The matrimonial business of those courts was transferred in that year to the newly constituted Court for Divorce and Matrimonial Causes, which was also given the new power of decreeing a dissolution of marriage. There is little in common between the three sides of this Division save that both probate and divorce business were originally exercised by the ecclesiastical courts, and that the law administered by all three sides of the Division is more influenced by Roman law than by either common law or equity. The combination of probate and divorce with admiralty is due, not to logic, but expediency. When the new High Court was formed, this Division was the residuary legatee of the old courts. A Divisional Court of two judges of this Division hears appeals from the justices in matrimonial matters under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925.

Court of Appeal.

Except where it is limited by statute there is a right of appeal from any Division of the High Court to the Court of Appeal. The judges of the Court of Appeal are the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, the Lords of Appeal in Ordinary, if qualified to be Lords Justices,[1] ex-Lords Chancellors (all the above are ex-officio members of the Court), and eight Lords Justices of Appeal. All these judges are appointed by the Crown on the recommendation of the Prime Minister. There usually sit the Master of the Rolls and the Lords Justices. The Court sits in two or three divisions usually of three judges, additional judges being drawn, when necessary, from the High Court. The Master of the Rolls presides over one division of the Court, the senior Lord Justice over the other (or others), but the Lord Chancellor may appoint a Vice-President of the Court to preside in one Division in the absence of an ex-officio member. The qualification of a member of the Court of Appeal is fifteen years' standing as a barrister or a judgeship of the High Court. There is no retiring age for members of the Court. Ordinary judges of the Court of Appeal may sit as judges of the High Court, and, if appointed after 1938, may be required so to sit.

House of Lords.

From the Court of Appeal an appeal by leave of the Court or of

[1] This excludes Scottish Lords of Appeal.

the House of Lords lies to the House of Lords, the supreme tribunal of England and Wales, Scotland and Northern Ireland, in which is vested the ancient jurisdiction of the High Court of Parliament. Besides its normal appellate jurisdiction in criminal cases, the House of Lords also has jurisdiction as a court of first instance. It tried those impeached by the House of Commons, and it tries peers accused of treason or felony or misprision of either. The sittings of the House of Lords for appellate business are in theory ordinary sittings of the House at which any business may be transacted, but in practice since *O'Connell's Case*[1] it has been a conventional rule that no lay peer shall take part in the exercise of appellate jurisdiction. Law Lords are the Lord Chancellor, the seven Lords of Appeal in Ordinary,[2] ex-Lord Chancellors and other peers who have held high judicial office.[3] The Lords of Appeal receive salaries and are bound to sit; the other Lords serve voluntarily. A Lord of Appeal must have held high judicial office for two years or have been a practising barrister (or advocate in Scotland) of fifteen years' standing. There is no age for retiring. There is a convention, but no more than a convention, that ex-Lord Chancellors in receipt of pensions should serve when requested to do so by the Lord Chancellor. On the hearing of appeals there must be present three Law Lords. The House usually sits in divisions of five or three. Before 1876 there were frequently only one or two peers with judicial experience, and the Lords frequently summoned the judges of the High Court[4] to advise them on questions of law, but since the creation in that year of the Lords of Appeal in Ordinary this practice has tended to fall into disuse. The judges were last summoned in a civil case in 1898 and in 1935 on the occasion of the trial of a peer for felony. Appeals may be heard when Parliament is prorogued.

Comparison with Judicial Committee of the Privy Council.

It is interesting to compare the procedure of the House of Lords with that of the Judicial Committee of the Privy Council, the final Court of Appeal from the Courts of the Empire.[5] In the House of Lords dissenting opinions are expressed. In the Judicial Committee one speech only is delivered, expressing the opinion of the majority of the judges, should there be any difference of opinion. The House of Lords is moved that an appeal be allowed or dismissed and the order made is entered in the Journals of the House. The Judicial Committee humbly advises His Majesty and the

[1] *O'Connell* v. *The Queen* (1844), 11 Cl. & Fin. 155.
[2] Appointed by the Crown on the recommendation of the Prime Minister.
[3] *E.g.* who have been Lords of Appeal, Judges of the Supreme Court or of the Court of Session in Scotland.
[4] P. 73, *ante*.
[5] Part X., Chap. 5.

decision is formally embodied in a subsequent Order in Council.[1] The House of Lords is bound by its own decisions. The Judicial Committee is in theory and, to a modified degree, in practice free from precedent. In 1929 the Judicial Committee examined the validity of one of their own decisions given two years previously: *Wigg and Cochrane* v. *Attorney-General of the Irish Free State*, [1927] A.C. 674; *Re Transferred Civil Servants' (Ireland) Compensation*, [1929] A.C. 242.

Lay Peers and Barristers.

When the House of Lords is sitting as a court of first instance lay peers may and do take part in the business. A barrister who is a peer may practise before the House of Lords in appeals, when the House is a court in which there only sit peers with judicial qualifications, but he may not practise before the House when it is trying criminal charges: *In re Lord Kinross*, [1905] A.C. 468.

Impeachment.

The Commons may impeach any person before the Lords for any crime or political misdemeanour. Before the full development of ministerial responsibility impeachment was a useful weapon enabling the Commons to call to account Ministers appointed by and responsible to the Crown. There has, however, been no impeachment since 1805. The Commons now have direct control over Ministers and so do not need to employ the cumbrous weapon of impeachment. By the Act of Settlement, 1701, a pardon from the Crown cannot be pleaded in bar of an impeachment, but it is nevertheless open to the Crown to pardon one who has been successfully impeached.

Trial of Peers.

The trial of peers for treason, felony or misprision of either takes place, when the House is sitting, in the House of Lords; when Parliament is dissolved or prorogued, the trial is in the Court of the Lord High Steward, who is appointed for the trial and is usually the Lord Chancellor. The privilege of trial by their peers (which cannot be waived) does not extend to the bishops, but does extend to peeresses in their own right and the wives and unmarried widows of peers. Indictments are found in an ordinary court and removed by order of certiorari into the House of Lords. Bishops may sit, but may not vote, in trials before the House of Lords; they may not even sit in the Court of the Lord High Steward. In the House of Lords all peers, though presided over by the Lord High Steward, are judges alike of law and fact. In the Court of the Lord High Steward that officer is the sole judge on questions of law, while the judges of fact are the other members of the court, who are such temporal peers—not less than twenty-three—as the Lord High Steward may summon. For trials for treason or misprision of treason all the temporal peers who have seats in the House of Lords must be summoned.

[1] For specimen, see Appendix C, p. 428, *post*.

No Civil Jurisdiction in First Instance.

It was at one time doubtful whether the House of Lords could try civil cases as a court of first instance. The exercise of such jurisdiction in the case of *Skinner* v. *East India Company* (1666), 6 St. Tr. 710, in the reign of Charles II., led to a prolonged dispute between Lords and Commons. Since that time no attempt has been made to exercise it. About the same time the case of *Shirley* v. *Fagg* (1675), 6 St. Tr. 1122, established the right of the Lords to hear appeals from the Chancery Court.

The Courts of Scotland:[1] Civil Courts.

The Sheriff Court, roughly corresponding to the County Court in England, but with a wider jurisdiction which is not subject to any pecuniary limit, is the most important lower civil court in Scotland. The Sheriff, who is a lawyer usually in practice in the Court of Session, acts mainly as an appeal judge, the ordinary work being performed by several Sheriffs-Substitute. There is a further appeal to the Inner House of the Court of Session if the value of the cause exceeds £50. There is also a Justice of the Peace Civil Court for debts up to £5. Justices, as in England, are appointed on the recommendation of the Lord Chancellor of Great Britain.

Court of Session.

The Court of Session has jurisdiction over the whole country. Originally emanating from the King's Council it assumed its present form in 1532 on the establishment of the College of Justice of which its judges, advocates and writers to the Signet are members. The judges are Senators of the College and number thirteen. Five (Lords Ordinary) sit as judges of First Instance (the Outer House). The remainder (Inner House) sit in two divisions presided over by the Lord President and the Lord Justice-Clerk respectively. From the Inner House an appeal lies to the House of Lords.

Criminal Courts.

The bulk of the criminal work is done by the Sheriff Court. In cases of breach of the peace and other petty offences the justices in Justice of the Police Courts in the counties and in Police Courts in the burghs have jurisdiction of a limited kind. There is an appeal to Quarter Session, or on questions of law to the High Court of Justiciary.

The Sheriff Court has jurisdiction to try any common law crime not expressly excepted, and all statutory offences assigned to it, provided that the maximum penalties are adequate (summary—three months' imprisonment or £25 fine; under solemn procedure with a jury—two years' imprisonment). Appeal lies to the High Court of Justiciary, which is also the highest criminal court of first instance. The court consists of the thirteen Senators, who are also Lords Commissioners of Justiciary. They go regularly on circuit as well as sitting in Edinburgh. Appeals against conviction

[1] See W. I. R Fraser, *Outline of Constitutional Law* (Hodge), 1938, Chaps. XII. and XIII.

by the Court are heard by three or more of its judges, but there is no further appeal to the House of Lords.

Prosecutions in Scotland.

Private prosecutions are very rare for common law offences, *e.g.* homicide, theft. Nor can a private person prosecute for such an offence or a statutory offence punishable with imprisonment without the option of a fine except by leave of a public prosecutor, unless there is express statutory provision. Every criminal court has a public prosecutor who is in the High Court and by solemn procedure in the Sheriff Court the Lord Advocate, in the latter court for summary offences a Procurator-Fiscal. As in England there are special provisions for summary trial of offences committed by juveniles.

CHAPTER 2.

THE JUDICIAL FUNCTION.

THE courts are the King's courts; "all jurisdictions of courts are either indirectly or immediately derived from the Crown. Their proceedings are generally in the King's name; they pass under his seal, and are executed by his office," but it is "impossible as well as improper that the King personally should carry into execution this great and extensive trust," [1] and further, as has been seen,[2] the British understanding of the separation of powers demands that the Judiciary should be independent of the Executive. It is enacted that the royal command shall not disturb or delay common justice, and that, although such commands are given, the judges are not therefore to cease to do right in any point.[3] Jurors must be duly empanelled and returned; excessive bail must not be imposed nor cruel and unusual punishments inflicted.[4] The early Kings delivered justice in their own courts. The delegation of this duty to judges was an early and inevitable result of the growth of the business of government and the development of a system of law requiring specialised knowledge. In 1607 James I. claimed the right to determine judicially a dispute between the common law courts and the ecclesiastical courts. That the right of the King to administer justice himself no longer existed was decided by all the judges headed by Coke: *Prohibitions del Roy* (1607), 12 Co. Rep. 63; K. & L. 276: The King as Judge.

> "The King in his own person cannot adjudge any case, either criminal, or treason, felony, etc., or betwixt party and party, concerning his inheritance, chattels or goods, etc., but this ought to be determined and adjudged in some court of justice according to the law and custom of England. God had endowed His Majesty with excellent science and great endowments of nature, but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it. The law is the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace."

Of this case Dicey wrote:[5] "Nothing can be more pedantic, nothing more artificial, nothing more unhistorical, than the reasoning

[1] 1 *Blackstone Commentaries*, Book I., Chap. VII.
[2] Part II., Chap. 1.
[3] Statute of Northampton, 1328.
[4] Bill of Rights, 1689.
[5] *Law of the Constitution*, 9th ed., p. 18.

by which Coke induced or compelled James to forgo the attempt to withdraw cases from the courts for His Majesty's personal determination. But no achievement of sound argument or stroke of enlightened statesmanship ever established a rule more essential to the very existence of the constitution than the principle enforced by the obstinacy and the fallacies of the great Chief Justice."

The creation of New Courts.

A similar limitation of the prerogative is found in the rule that the Crown can no longer by the prerogative create courts to administer any system of law other than the common law. The common lawyers were the allies of Parliament in the struggle with the Stuarts, and the victory of Parliament meant the disappearance of the prerogative courts of the Star Chamber and the High Commission. Even the Court of Chancery barely escaped the destructive ardour of the Commonwealth. In the case of *In re Lord Bishop of Natal* (1864), 3 Moo. P.C. (N.S.) 115; K. & L. 278, the Judicial Committee held that the Crown had no power to create by letters patent a metropolitan see of Cape Town endowed with coercive authority and jurisdiction over a suffragan bishop.

> "It is a settled constitutional principle or rule of law, that, although the Crown may by its prerogative establish courts to proceed according to the common law, yet it cannot create any new court to administer any other law."

Thus the creation of a court of equity in a settled colony [1] would require an Act either of the Imperial Parliament or the Colonial Legislature. Similarly no extraordinary tribunals can be established in this country without parliamentary sanction.

The Executive and Criminal Proceedings.

The vast majority of criminal prosecutions are instituted either by the police or a government department, *e.g.* the revenue authorities for customs offences, but in general any person may initiate a prosecution whether or not he had been injured by the alleged crime. Certain prosecutions may, however, only be instituted with the consent of the Attorney-General, *e.g.* certain offences against the State, under the Official Secrets Acts or Public Order Act, 1936, or offences where great harm might be occasioned by a vexatious charge, *e.g.* offences under the Punishment of Incest Act, 1908.

Director of Public Prosecutions.

The Director of Public Prosecutions—a barrister or solicitor—is appointed by the Home Secretary and works under the general supervision of the Attorney-General. The Director prosecutes in certain types of cases, where he is required by regulations to prosecute, *e.g.* all murder cases and certain other grave crimes, when so directed by the Home Secretary or Attorney-General, and also where it appears to the Director himself that he ought to take over a particular case because of its difficulty.

[1] Part X., Chap. 2.

Political Crimes.

The institution of prosecution for political offences, *e.g.* sedition, may involve considerations of policy as well as law. In such cases decision may be taken by the Home Secretary, or even the Cabinet, with the advice of the Attorney-General as chief law officer of the Crown.

Nolle Prosequi.

The Attorney-General may at any time stop a criminal prosecution by the entry of a *nolle prosequi*. This power is used to stop vexatious prosecutions. Its exercise is open to criticism by the Legislature, and any abuse is prevented by the ordinary principle of ministerial responsibility: *The Queen* v. *Allen* (1862), 1 B. & S. 850; K. & L. 274.

The Prerogative of Pardon.

Criminal proceedings may similarly be prevented by the exercise of the royal prerogative of pardon. This power is ordinarily exercised by the King after sentence on the advice of the Home Secretary, when there is some special reason why a sentence should not be carried out. Until 1908 English law provided no adequate means of reviewing judicially the judgment of a criminal court,[1] and accordingly the method of rectifying any injustice was by the grant of a pardon. Thus this Minister was forced into the position of a final court of appeal in criminal cases, without possessing any of the ordinary powers of a court of law, such as taking evidence on oath. The Criminal Appeal Act, 1907, established the Court of Criminal Appeal—a similar court was established for Scotland in 1928—and thus relieved the Home Secretary and the Secretary of State for Scotland of responsibilities which it was inconvenient that they should discharge. The prerogative of pardon is essentially an executive act and should not involve judicial issues. But the prerogative still remains and is in particular exercised by the Home Secretary in relation to death sentences. By section 19 of the Criminal Appeal Act, 1907, the Secretary of State, on the consideration of any petition for the exercise of the prerogative, may (*a*) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the court, as in the case of an appeal by the person convicted, or (*b*) if he desires the assistance of the court on any point arising in the case refer that point for their opinion thereon. Pardons under the prerogative are of three sorts:

Types of Pardon.

(1) A free pardon rescinds both the sentence and the conviction.[2]

(2) A commutation, or conditional pardon, substitutes one form of punishment for another. A capital sentence is usually commuted

[1] By the Crown Cases Act, 1848, the practice of the judges of holding informal meetings from time to time to discuss difficult questions arising at criminal trials was regularised by the institution of the Court for Crown Cases Reserved. This court had power to determine points of law reserved by the trial judge solely at his own discretion.

[2] For specimen, see Appendix C, p. 434, *post*.

to penal servitude for life, if the Home Secretary advises an exercise of the prerogative.

(3) Remission reduces the amount of a sentence without changing its character, *e.g.* reduces a sentence of imprisonment from six months to two months, or remits part of a fine.

In addition to the above three modes of pardoning, there is a power to reprieve or respite sentence. This postpones the carrying out of a sentence, and is largely resorted to in capital cases pending the formal grant of a commutation, or conditional pardon; the Secretary of State can signify the King's pleasure in this way by an order under his own hand, whereas the more formal modes, which formerly to have full legal effect had to be passed under the Great Seal, still require a warrant under the royal sign manual, countersigned by the Secretary of State.

Limitations on Prerogative of Pardon.

The prerogative of pardon closely resembles the dispensing power. It can only be exercised subject to the following limitations:

(1) The offence must be of a public character, and the Crown has no power to remit judgment in suits between subject and subject.

(2) The pardon cannot be used as a licence to commit crimes. It can, however, be pleaded in bar of an indictment, or, after verdict, in arrest of judgment, except that under the Act of Settlement, 1701, a pardon may not be pleaded in bar of an impeachment by the Commons in Parliament. Nor can the King pardon the unlawful committing of any man to prison out of the realm: Habeas Corpus Act, 1679. By common law the commission of a public nuisance cannot be pardoned until the nuisance has been abated. Occasionally, however, the Crown withdraws a prosecution with leave of the court, or alternatively declines to offer the further evidence, without which a conviction cannot be secured. Moreover, as we have seen, the Attorney-General, as representing the Crown, can, at his absolute discretion, enter a *nolle prosequi*, which effectually stops all further proceedings.[1] A private prosecutor has no absolute right to withdraw a charge.

(3) A pardon only relieves from the penalty resulting from criminal proceedings, but not from the conviction, unless a free pardon is granted.

Bench and Bar.

There are two main distinctions between the English judicial system and that of continental countries. In continental countries judgeship is a career. The young judge starts his career in one of the lowest courts and hopes to advance steadily to the highest courts. In England judges—both of inferior and superior courts—are appointed from practising members of the Bar. They have thus a tradition of independence and their affinities are with the Bar rather than the Civil Service. They are, too, less concerned

[1] P. 211, *ante*.

with promotion. Only once has a county court judge been promoted to the High Court Bench. Promotion from the High Court to the Court of Appeal involves no increase in salary.

Lord Chancellor.

The other main distinction is the absence of a Ministry of Justice. Appointments to the High Court Bench and county court judgeships are made on the recommendation of the Lord Chancellor who has always had experience as a practising barrister. The administrative business of the Supreme Court and the appointment of court officials is partly in the hands of the Lord Chancellor and partly of the judges.[1] Rules of the Supreme Court are made by the Rules Committee consisting of the Lord Chancellor and other judges with two practising barristers and two practising solicitors. The Lord Chancellor appoints the County Court Rules Committee and may alter or disallow the rules made by it. The Lord Chancellor too, as we have seen, appoints and removes lay magistrates. In the Lord Chancellor's Office there are departments for the County Courts and for Justices of the Peace. Proposals for law reform relating to the field of private law (contract, tort or property) are the responsibility of the Lord Chancellor. In 1934 there was established a Law Revision Committee to advise on changes in private law, where references are made to them by the Lord Chancellor.

Judicial duties of the Home Secretary.

Other duties performed by a Minister of Justice fall to the Home Secretary. He may grant separate Courts of Quarter Sessions to boroughs, and upon his recommendation there are appointed recorders of boroughs possessing such courts,[2] metropolitan magistrates, who are salaried judicial officers, and stipendiary magistrates, the equivalent of metropolitan magistrates, in certain large towns which have requested their appointment. The administrative arrangements for metropolitan courts are under the control of the Home Office and the Home Secretary confirms appointments of clerks to justices throughout England and Wales. Magistrates' courts are independent judicial authorities and in the exercise of their judicial functions can be controlled only by the King's Bench Division through the prerogative orders.[3] The Home Office, however, exercises the function of securing uniformity by means of advisory circulars in regard to such topics as sentences and the collection of fines, and sometimes containing advice in regard to the interpretation of statutes and regulations. Lay magistrates are appointed by the Lord Chancellor,[4] but the general administration of magistrates' courts is the responsibility of the Home Secretary.

[1] Primarily the Presidents of the various Divisions of the Supreme Court.

[2] The Recorder of the City of London is appointed by the Court of Aldermen, and a few boroughs where Quarter Sessions have no criminal jurisdiction have the right to appoint their own Recorder.

[3] See Part VII., Chap. 4.

[4] P. 195, *ante*.

The Home Secretary is responsible for the probation system and the care of juvenile delinquents, and through the Prison Commission for the administration of prisons, Borstal institutions and the criminal lunatic asylum at Broadmoor. Approved schools (industrial and reformatory schools) are inspected by the Home Office.

Advocates of a Ministry of Justice argue that the present division of responsibility between the Lord Chancellor and Home Secretary is illogical and results in no one Minister being responsible for reform. On the other hand, to entrust all judicial appointments to a Ministry of Justice might lead to political appointments to the Bench.

The Judges and the Constitution.

The primary function of the Judiciary is to determine disputes, either between subjects or between subjects and the State. Judges must apply the law and are bound to follow the decisions of the Legislature as expressed in statutes. In interpreting statutes and applying decided cases they do, however, to a large extent make, as well as apply, law. In countries where there is a written constitution (*e.g.* United States) which cannot be overridden by the ordinary process of legislation, the Judiciary is in a special sense the guardian of the constitution and may declare a statute to be unconstitutional and invalid. In England the chief constitutional function of the Judiciary is to ensure that the administration conforms with the law. The supremacy of the will of the people as expressed by their representatives in Parliament rests upon the rule of law enforced by the courts.

Judicial Independence.

It is clearly desirable that judges should not only be independent of the Government, but also free from liability to vexatious actions for acts done in the exercise of their duty. It is better that private persons should suffer injuries than that judges should be influenced, to however slight a degree, in the dispensing of justice by fear of the consequences. These considerations apply to the judges of any country, but they apply with still greater force to the judges of a country in which individual rights and constitutional liberties depend upon the decisions of the ordinary courts.

Appointment and Dismissal of Judges.

In the exercise of such powers as that of issuing the prerogative writ of habeas corpus [1] the judges are sometimes in the position to control officers of the Government in the interest of the liberty of the subject. It is essential that they should be free from any fear of dismissal by the persons whom they may be asked by a litigant to control. Judges of the High Court and of the Court of Appeal, with the exception of the Lord Chancellor, are appointed by the Crown to hold their offices during good behaviour subject to a power of removal by His Majesty on an address presented to His Majesty by both Houses of Parliament: Supreme Court of

[1] Part VIII., Chap. 1.

Judicature Act, 1925, s. 12.[1] A similar provision applies to Lords of Appeal: [2] Appellate Jurisdiction Act, 1876, s. 6. Judges' salaries are fixed and are charged and paid out of the Consolidated Fund: [3] Supreme Court of Judicature Act, 1925, ss. 13 and 15. The salary of the Lord Chancellor is such yearly sum as with the amount payable to him as Speaker of the House of Lords (£4,000) makes up the sum of £10,000 a year; the salary of the Lord Chief Justice is £8,000 a year; of Lords of Appeal and the Master of the Rolls £6,000 a year; of Lords Justices of Appeal and Judges of the High Court £5,000 a year.

Procedure for Removal.

Offices held during good behaviour may in the event of misconduct be determined without an address to the Crown by *scire facias*, criminal information or impeachment. In practice it is unlikely to-day that any of these methods would be preferred to removal by an address. An address to the Crown for the removal of a judge must originate in the House of Commons. The procedure is judicial and the judge is entitled to be heard. County Court judges are appointed by the Lord Chancellor from barristers of at least seven years' standing and may be removed by him for inability or misbehaviour. Magistrates may be removed from the commission of the peace by the Lord Chancellor, though in practice a magistrate is not removed unless his conduct becomes scandalous.[4]

Judicial Salaries.

The Act of Settlement provided that the salaries of the judges shall be ascertained and established. It is perhaps unsatisfactory that, though an address by both Houses of Parliament is required to secure the removal of a judge (in the absence of misconduct), under the provisions of the Parliament Act, 1911 the House of Commons alone might reduce a judge's salary by any amount.[5] Under the constitutions of the Commonwealth of Australia and Eire judges' salaries may not be diminished during tenure of office.

Scotland.

Judges of the Court of Session are appointed for life and cannot be removed except on grounds of misconduct (*ad vitam aut culpam*): Claim of Right, 1689. There is no statutory provision for the removal of judges of the Court of Session, but sheriffs, sheriffs-substitute and stipendiary magistrates may be removed by the Secretary of State for Scotland on a report by the Lord President and the Lord Justice-Clerk.

Judicial Immunity from Civil Actions.

It is a general proposition of the common law that no action will lie against a judge for any acts done or words spoken in his judicial

[1] For similar repealed provision of the Act of Settlement, see p. 6, *ante*.
[2] P. 205, *ante*. [3] P. 158, *ante*.
[4] For supplementary list, see p. 196, *ante*.
[5] Judges' salaries were included in salary reductions effected by Order in Council made under the National Economy Act, 1931; see Sir William Holdsworth in 48 *L.Q.R.*, p. 25; E. C. S. Wade in *Law Times*, April 2 and 9, 1932, and reply by Sir William Holdsworth, *Law Times*, May 7, 1932.

capacity in a court of justice. " It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges shall be at liberty to exercise their functions with independence and without fear of consequences ": *Scott* v. *Stansfield* (1868), L.R. 3 Ex. 220, *per* Kelly, C.B., at p. 223. It can be argued from the authorities that the judge of a superior court of record is not liable for anything done or said in the exercise of his judicial functions, even if he exceeds his jurisdiction, but it is the better opinion that the judges of both superior and inferior courts of record are in the same position in that they are liable if they act outside their jurisdiction, but not for any error or irregularity within their jurisdiction. In the case, however, of an inferior court, the judge must prove that he had jurisdiction ; [1] in the case of a superior court the plaintiff must prove want of jurisdiction.[2]

Scope of Immunity.

In the case of acts done within the jurisdiction the immunity exists, however malicious, corrupt or oppressive be the words complained of: *Anderson* v. *Gorrie*, [1895] 1 Q.B. 668 ; K. & L. 168. Immunity does not attach to a ministerial, as opposed to a judicial, act. Thus an action lies for a wrongful refusal to hear a case, but not for a wrongful decision: *Ferguson* v. *Earl of Kinnoull* (1842), 9 Cl. & F. 251 ; K. & L. 185. Moreover a judge is not liable where he exceeds his jurisdiction owing to a mistake of fact, unless he ought to have known the facts ousting his jurisdiction: *Calder* v. *Halkett* (1839), 3 Moo. P.C. 28. A similar immunity to that of judges attaches to the verdicts of juries: *Bushell's Case* (1670), 6 St. Tr. 999 ; K. & L. 170, and to words spoken by parties, counsel and witnesses in the course of judicial proceedings.

Inferior Courts.

The same immunity exists in the case of inferior courts not of record, *e.g.* petty sessional courts: *Law* v. *Llewellyn*, [1906] 1 K.B. 487, where it was held that no action lies against a justice of the peace in respect of defamatory words spoken by him when exercising judicial functions. Even when a justice is sued in respect of his performance of administrative duties, it is necessary to prove that he acted maliciously and without reasonable or probable cause.[3] When a magistrate acts outside his jurisdiction it is unnecessary to prove malice, but no action may be brought in respect of anything done under a conviction until the conviction has been quashed.[4]

[1] *Carratt* v. *Morley* (1841), 1 Q.B. 18,
[2] *Peacock* v. *Bell* (1667), 1 Saund. 73,
[3] Justices Protection Act, 1848, s. 1 ; *Everett* v. *Griffiths*, [1921] A.C. 631, at p 666.
[4] Justices Protection Act, s. 2, 1848.

The absolute protection given to members of courts acting within their jurisdiction attaches also to members of tribunals which have the attributes of a court, *e.g.* a court-martial.[1] Where a tribunal does not have the attributes of a court, its decisions and words spoken in the course of its proceedings are privileged only in the absence of malice, even though it is under a duty to act judicially, *e.g.* the London County Council when sitting to grant music licences: *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson*, [1892] 1 Q.B. 431; K. & L. 207.

Scotland.

In Scotland a magistrate or justice of the peace will be liable in damages for acting without or in excess of jurisdiction: *McCreadie* v. *Thomson*, [1907] S.C. 1176; Summary Jurisdiction (Scotland) Act, 1908, s. 59. The action must be brought within two months of the proceedings complained of.

Criminal Liability of Judges.

The criminal law punishes corruption, neglect of duty or misconduct in the execution of judicial duties. The overriding importance of the protection of the liberty of the subject is shown by the fact that a High Court judge who unlawfully refuses to issue a writ of habeas corpus during vacation is liable to a fine of £500 to be paid to the person detained.

[1] And to counsel, witnesses and parties.

Note.—No attempt has been made to give more than an outline of the judicial organisation. For a full account together with criticisms and suggestions for reform the student should read *The Machinery of Justice*, by R. M. Jackson (Cambridge University Press).

PART VI.

LOCAL GOVERNMENT.

Principles of Local Government Law, 2nd ed., by W. Ivor Jennings (University of London Press).

An Introduction to the Law of Local Government and Administration, 2nd ed., by Sir W. E. Hart and W. O. Hart (Butterworth).

Local Government, by J. P. R. Maud (Home University Library).

The Ministry of Health, The Whitehall Series (Putnams).

CHAPTER 1.

GENERAL FEATURES.

A.

Development of Local Government.

Antiquity of Local Government.

IT is doubtful whether even the oldest of our central organs of government can be traced back to an earlier time than the reign of William the Conqueror, but our present counties and parishes find their origin in the shires and hundreds, vills or townships of pre-Norman days. The central government of England was largely superimposed upon existing local organisation. Modern legislative reforms have recognised local government as an established fact and our present local government areas largely reflect ancient conditions.[1]

Early Middle Ages.

In the early Middle Ages each county or shire had its court or governmental assembly, presided over by the sheriff as the royal representative and composed of the freemen of the county. The county court performed general governmental as well as judicial functions. Within the county were hundred courts similarly composed and under the supervision of the sheriff. The manorial courts of the feudal system were the courts of the smaller units, the vill and the township. Boroughs which obtained charters from the Crown possessed varying degrees of autonomy. The justices in eyre, royal judges with wide powers both administrative and judicial, controlled the local courts by means of periodic

[1] For the history of Local Government, see Hart and Hart, *op. cit.*, Part I., Chap. I.

visitations. From the time of Henry II. onwards royal justice began to cover the whole country through the circuits of justices of assize and general gaol-delivery. The local and manorial courts were superseded and with them the office of sheriff lost much of its former importance.

Justices of the Peace.

In the fourteenth century the newly created justices of the peace acquired judicial, police and administrative powers. The parish, an ecclesiastical unit, also became the unit of local administration, just as in earlier times the feudal manor had given an organisation to the vills or townships. It was the parish which was liable for the repair of roads and later for the administration of the Elizabethan poor law. Justices exercised control over the parish and its officers. The justices themselves were controlled by the Council and the Court of Star Chamber, but this influence disappeared with the curtailment by the Long Parliament in 1640 of the powers of the former body and the abolition of the latter.

Eighteenth Century.

No attempt was made after the Revolution Settlement in 1689 to re-impose central administrative control. Apart from the boroughs, which were largely autonomous acting under their charter powers, general local administration was in the hands of the county justices sitting in Quarter Sessions. Judicial control existed by means of the prerogative writs of mandamus, certiorari and prohibition issued by the Court of King's Bench.[1] It was during this century that there was developed the device of the *ad hoc* authority—a separate body for a particular service as opposed to the general administrative authorities exercising various powers in a particular area, the parish and the justices. At first by means of local Acts and later by public measures applying to the whole country Parliament encouraged the creation of *ad hoc* authorities for different purposes, *e.g.* commissioners of sewers and improvement commissioners.

Era of Reform.

With the Report of the Poor Law Commissioners in 1834 there opened an era of local government reform. By the Poor Law Act, 1834, there were established *ad hoc* authorities (boards of guardians) to administer the reformed poor law and at the same time there was re-imposed central control through the Poor Law Commissioners —a body of three officials of the Central Government with no Minister responsible to Parliament for their activities.[2] Other reforms followed. The boroughs underwent a drastic reorganisation under the Municipal Corporations Act, 1835, and became effective units of administration governed by councils elected on a uniform franchise.

[1] P. 219, *post.*

[2] Their functions were in 1847 transferred to a Poor Law Board responsible to Parliament through its President, a Minister of the Crown.

Elected All purpose Authorities.

By the end of the nineteenth century the all-purpose authority elected on a wide franchise was in the process of superseding the *ad hoc* authority as the administrative agency of the main services of local government. The Municipal Corporations Act, 1882, like the Act of 1835, was primarily concerned with internal organisation and corporate property. The Act of 1835 had secured that all borough councils should be elected on a wide franchise. The 1882 Act was a consolidating measure and conferred few powers of local government. While it strengthened the organisation of the more efficient authorities and thus indirectly contributed to the supersession of the *ad hoc* authority, it did not result in any considerable transfer of powers. The Local Government Act, 1888, transferred to elected county councils the administrative powers of Quarter Sessions. The Local Government Act, 1894, converted into elected urban district councils the urban sanitary authorities which had been set up under various Public Health Acts and established elected rural district councils, to which were transferred the public health functions of the boards of guardians. Thus highways and public health became services of the all-purpose authorities. Early in the twentieth century education, and in 1929 the poor law, thenceforth known as public assistance, were transferred to the larger of such authorities.

Ad hoc authorities were, however, established for various purposes through the nineteenth century, *e.g.* the school boards by the Education Act, 1870, which endured until the larger all-purpose authorities became local education authorities in 1902. The principal remaining *ad hoc* authorities, the boards of guardians, were abolished by the Local Government Act, 1929, which transferred their functions to county and county borough councils, but *ad hoc* authorities remained for a few special purposes, *e.g.* land drainage. Moreover for certain purposes the larger authorities have been divided into *ad hoc* districts not corresponding to the normal county districts, *e.g.* the areas of guardians committees into which counties were divided for public assistance purposes by the Poor Law Act, 1930. Under the Education Act, 1944, the local education authorities are the county and county borough councils. In order to preserve and extend local initiative in the county areas county councils must draw up schemes of divisional administration for the delegation of certain of their functions to divisional executives. Boroughs and urban districts with a population of not less than 60,000, or a school population of not less than 7,000, will be divisional executives and may draw up their own schemes of delegation. In special circumstances the Minister may confer a similar right on other boroughs or urban districts.

Joint Committees and Boards.

For many matters too co-operation between areas is essential for administrative efficiency and economy and the principle of the *ad hoc* authority has tended to reappear in the shape of joint committees or joint boards. A joint committee, *e.g.* a maternity and child welfare committee of two public health authorities, is a committee to which different authorities appoint representatives who are responsible to the appointing authorities. The use of joint committees enables services to be administered in areas most fitted to produce efficiency without any sacrifice of the convenience and symmetry secured by the maintenance of a uniform system of all-purpose local authorities.[1] A joint board, *e.g.* a board set up by the Minister of Health to govern two or more districts unified for any public health purposes, is, when once appointed, a separate entity with powers of its own.

Central Control.

The Poor Law Act of 1834 imposed central control upon local authorities and the poor law under its modern name of public assistance remains to-day a service where direct control is imposed, but the control is that of a Minister responsible to Parliament and not that of an independent board.[2] The Municipal Corporations Acts of 1835 and 1882 and the Local Government Acts of 1888 and 1894 imposed but little central control, but in respect of particular services, *e.g.* public health, housing, education and town and country planning there has been a steady advance towards central control mainly by indirect though effective means.[3] In 1872 there was established the Local Government Board (now the Ministry of Health) and as a result poor law and public health came under one central control though only in the case of the poor law was the control direct.

B.

Characteristics of Local Authorities.

What is Local Government?

There is no hard and fast dividing line between the services administered by central and local government. In the main matters of local rather than national importance are entrusted to local authorities, but many services are administered by the local representatives of central authorities which, had they been established earlier, might have been entrusted to local authorities. Some modern services, *e.g.* national health insurance,[4] unemployment insurance and assistance, and widows', orphans' and old age pensions are so administered. Nevertheless, new functions are also constantly placed upon local authorities by Parliament, usually

[1] Hart and Hart, *op. cit.*, p. 136.
[2] P. 219, *ante*, note 2.
[3] Pp. 225–6, *post*.
[4] Up to the present national health insurance has been administered through the agency of friendly (approved) societies.

accompanied by provision out of the Exchequer to meet part of the cost. Older services, *e.g.* public assistance (poor law relief), public health and highways, are mainly administered by locally elected bodies. Education, which in a strictly logical system should be a central service, is administered by the local education authorities, but central inspection, regulation and supervision is closer than with other local services (except public assistance) and the Minister of Education since 1944 controls and directs the execution by local education authorities of a national policy.

Powers of Local Authorities.

The prerogative plays no part in local government, and local authorities, though representative bodies chosen by popular election, have not the autonomy of Parliament. Even on matters admittedly of local rather than national interest they cannot determine their own powers. Their powers are derived from statutes and exercised subject to the *ultra vires* rule. Within the limits of its powers a local authority may act as it pleases provided that it performs the specific administrative duties imposed upon it and subject always to the pressure that the Central Government can bring to bear through supervision, withholding of grants, and, in the last resort, supersession.

Party Politics.

The cleavage due to party issues is less marked in local than in national affairs, though there are party divisions, at all events in London and most boroughs. Politics play their part in local elections, but the policy of a council is less susceptible to changes due to political influence. There is more continuity of personnel. Members are elected for fixed periods, and usually are re-elected from time to time if they offer themselves for re-election. County and borough councils elect aldermen, who hold office for a longer period than elected councillors and consequently may have considerable sway in the direction of policy and preservation of continuity. The chairmen of all local authorities and of their principal committees tend to be men with long experience of the work.

Committees.

Local elected authorities mainly perform administrative functions. Within their powers they determine policy and they have power to enact by-laws, subject to the sanction of the appropriate government department. They are, however, chiefly concerned with the maintenance of public services which they are by law required to administer. The work of the larger councils is conducted through committees. Most matters are initiated in committee. Even the general policy of a council arises on a committee report rather than at the outset by resolution of the council. Most communications addressed to a council are sent to the appropriate committee and are never seen by the council as a whole. It would be impossible to carry on the work of the larger local authorities if the committee system had not been adopted.

Local Government Officers.

No payment is made generally to members of elected local authorities in return for their services. A county council is empowered to pay the expenses of its members for attendance at meetings of the council and its committees. Elected councillors render only part-time service. It is difficult for busy men and especially for those who are employees to give much time to local government work, and the days of a leisured class with ample time are rapidly passing away. Inevitably there results an increase in the influence of the paid official. The direction of policy is the task of the elected representative; its execution that of the permanent official. A local government officer is more closely controlled by the committee to which he is responsible than are civil servants by Ministers. Committees do not confine themselves to policy, but supervise the administrative work for which they are responsible. Where there is a capable chairman of a committee, there is little danger that the permanent official will direct policy overmuch. Indeed, there is more danger that committee members will be too active in matters of routine which are better left to permanent officials.[1]

Appointment of Officers.

The officers of local authorities are not members of a single public service, as are civil servants, but a local authority recruits its staff independently, and at present the system of recruitment falls short of the carefully contrived system of the Civil Service. Officers are responsible to the elected bodies by which they are appointed, though in some cases the appointing authority is anomalously not liable for the acts of its servants where the latter are guilty of negligence in the performance of duties placed by statute upon them as agents of the Central Government.[2] There is an obligation to appoint certain officials. Thus both a county and borough council must appoint a clerk, a treasurer, a medical officer of health and a surveyor. A borough must also appoint a sanitary inspector.

The problem of Areas.

We have seen how by 1930 the *ad hoc* authority had for the time being been, with a few exceptions, superseded by the all-purpose authority. There is, however, no finality in the distribution of functions between the various authorities. The Central Government encroaches upon local authorities, and larger authorities absorb the power of smaller authorities. Certain matters once reasonably entrusted to local authorities become of importance to the nation as a whole or require the application of a uniform national policy. Certain services are used by the nation as a whole and cannot rightly remain a charge upon local areas. Thus relief of the able-bodied unemployed became a national service with the setting up of the Assistance Board in 1934, and trunk roads were transferred in 1936 to the Minister of Transport. The importance of fire services

[1] *Cf.* Jennings, *op. cit.*, p. 118.
[2] *Stanbury* v. *Exeter Corporation*, [1905] 2 K.B. 838; Part VII., Chap. 2, *post.*

to the Civil Defence during the Second World War led to their amalgamation into a National Fire Service under the Home Office. As reconstruction plans began to take shape there was seen a marked tendency to deprive local authorities, and particularly the smaller ones, of their powers in the interests of efficiency and uniform administration. Even where there is no pressure for the transfer of powers to the Central Government, there is pressure for the transfer of vital services to the larger authorities and the creation of larger areas. It is difficult to equate the comparative inefficiency and penury of a poor agricultural county or a small borough in a rural area with the efficiency and wealth of a prosperous and autonomous urban area of the size, say, of Birmingham. On the other hand as areas become larger, local patriotism becomes less and there is no longer direct contact between the citizen and his local councillor. If the smaller bodies are shorn of all their effective powers, it will no longer be worth the while of good men to stand for election. The nation has gained much from the use of local government as a training ground for national politics, and national life would be impoverished if the smaller authorities disappeared or became ineffective. There is, however, a widespread belief that the smaller authorities do not attain an adequate standard of efficiency and that they are in too close contact with their constituents to apply their powers fearlessly where individual rights are affected. In 1945 a governmental pronouncement on local government organisation advocated the retention of the present system of areas with the continued establishment of joint boards or joint committees where co-ordination of services between two or more areas is necessary. Such a policy does not, however, rule out ultimate integration of the joint bodies in any area into a single co-operating unit, if experience should show this to be desirable.[1]

C.

Central Control.[2]

Ministry of Health.

The Ministry of Health was established by the Ministry of Health Act, 1919, in order to centralise under one department the control of matters affecting public health. The department took over the work of the old Local Government Board and of the National Insurance Commissioners and some functions of other departments, *e.g.* the Board of Control, supervising the care of mental patients, which was formerly under the Home Office. While education comes under its own Ministry, the upkeep of roads chiefly under

[1] *Local Government in England and Wales during the Period of Reconstruction*, 1945 Cmd. 6579.

[2] See Jennings, *op. cit.*, Chap. VIII., and Hart and Hart, *op. cit.*, Part I., Chap XV.

the Ministry of Transport and the police and elections under the Home Office, the Ministry of Health in most other matters is the department which supervises local government services. Other services, such as unemployment and health insurance, agriculture, war pensions, though highly important matters of internal government, are not local services. Much of their administration is local, but the officials or committees which administer them are responsible directly to the Minister concerned, who usually appoints them. The Ministry of Health is in relation to local authorities mainly a supervising department and, as such, it is freely consulted and tenders its counsel.

Functions of Ministry.

The old Local Government Board had as its chief functions (1) the control of poor relief; (2) powers in relation to public vaccination; (3) general control over the registration of births and deaths, and (4) supervision, with some control, of the administration of public health and local government in general, chiefly by supervising the work of local authorities, by inspection by medical officers and by grants-in-aid. In addition to these functions the Ministry of Health is responsible for housing policy and the proposed national health service. Its purpose is, broadly, to co-ordinate measures conducive to the health of the people. It is the department which, above all others, has taken parliamentary powers of the widest description, enabling it to perform legislative and judicial functions. As such it has attracted the criticisms of critics brought up in the tradition of the rule of law. Without such powers it is doubtful whether it could have administered novel schemes of social welfare, such as health insurance.

Ministry of Education.

The task of the Ministry of Education, which in 1944 replaced the Board of Education, is to promote the education of the people and the progressive development of institutions devoted to that purpose. It is the duty of the Minister to secure the effective execution by local authorities under his control and direction of the national policy for providing a varied and comprehensive educational service in every area of England and Wales. Thus there is exercisable direct control by a central department over a service which essentially depends upon a national rather than local policy, but which continues to be administered by a local representative authority.

Ministry of Transport.

The Ministry of Transport [1] controls the exercise of the highway functions of local authorities, largely through grants given for the construction and upkeep of the roads for which they are responsible.

Methods of Control.

It has been seen [2] how there was a growing tendency during the nineteenth century towards greater central control of local authorities. Despite the creation in 1872 of the Local Government Board with a Minister at its head the degree of control exercised

[1] Since 1940 the Ministry of War Transport.

[2] P. 221 *ante*.

to-day was not achieved until the Local Government Act, 1929, which reduced the local taxation income of local authorities and led to a reconsideration of the relations between the Exchequer and local authorities. The methods of control are many and various. By-laws [1] require the confirmation of the Ministry of Health or sometimes of another Minister, *e.g.* those relating to law and order which need the approval of the Home Secretary. The sanction of a government department (usually of the Ministry of Health) is required before a local authority may exercise its borrowing powers.[2] The accounts of local authorities are audited by district auditors of the Ministry of Health.[3] Inspection by officers of the Central Government (*e.g.* of schools by Board of Education inspectors; of police forces by the Home Office [4]) is a condition precedent to grants for specific services. There is further a power to reduce the general exchequer grant made for all public health services [5] if a reasonable standard of efficiency and progress is not maintained. This power operates as a potential threat rather than as a weapon to be used in practice, since its use would throw into chaos the local administrative machine and lead either to the abandonment of services, at all events in part, or to an intolerable increase in local taxation. Statutes affecting local government usually give powers to a department to make the necessary regulations and orders to bring the statute into effect. Frequently local authorities are required to prepare schemes and submit them for approval. Frequently statutes provide that an appeal from the decision of a local authority shall lie to the appropriate central department, usually the Ministry of Health. Sometimes the Minister of Health may, where a local authority fails in its duties, either act himself or transfer the function concerned to some other authority. Though the closest control is exercised in relation to public assistance, with the direction and control of which the Minister of Health is specifically charged,[6] the control in relation to other services is no less effective.

Conclusion. It will be seen that the methods of central control are both numerous and effective. None the less local administration and to a limited extent the framing of policy remain functions of local authorities. The Ministry of Health secures the co-operation of local authorities and the relationship is one of friendly partnership. But for such a relationship local authorities could obstruct the objects of central policy by the adoption of a *non possumus* attitude. Local authorities are not branches of departments in Whitehall. Their members are elected by the districts which they serve. Their services are administered by their own officers and the quality of administration varies from area to area.

[1] P. 242, *post.* [2] P. 245, *post.* [3] P. 245, *post.*
[4] Part IV., Chap. 7. [5] P. 244, *post.* [6] Poor Law Act, 1930, s.1.

CHAPTER 2.

LOCAL GOVERNMENT: ORGANISATION AND GENERAL DUTIES OF LOCAL AUTHORITIES.

Local Authorities.

THE Local Authorities in England and Wales [1] are:

1. Councils of the administrative counties (County Councils).
2. Councils of boroughs which are county boroughs (County Borough Councils).
3. Councils of county districts (Borough Councils, Urban and Rural District Councils).
4. Parish Councils and Parish Meetings.

The county borough is a self-contained area. The county is divided into districts and may be described as a two-tiered authority, if the parish authority be ignored.[2] Thus a rural parish will be in the rural district of X in the administrative county of Y and the county and district councils will both exercise authority in the parish for different purposes.

Review of Areas.

Under the Local Government Act, 1933, a county council had a discretion to, or could be required by the Minister of Health to, review every ten years the status and boundaries of county districts and parishes. Proposals submitted by counties required confirmation by the Minister. Where a borough objected to any proposal affecting the borough, an order by the Minister was provisional only and had to be confirmed by Parliament. A new county borough could only be constituted by private Act of Parliament, and extensions of such boroughs required a Provisional Order, or, if the Minister declined to make the Order, a Private Act. By the Local Government (Boundary Commission) Act, 1945, a Local Government Boundary Commission is constituted to conduct county reviews, and also to handle the creation and extension of county boroughs, and the union of contiguous county boroughs, and also of county boroughs and counties. The Minister of Health has power to give general directions to the Commission, which require parliamentary approval by an affirmative resolution. The orders of the Commission are final except those relating to the status or

[1] The Standing Joint Committee of the County Council and Quarter Sessions is the local police authority, except in boroughs possessing a separate police force which is administered by the Watch Committee of the Council. For Police, see Part IV., Chap. 7.

[2] The functions of parish councils and parish meetings (p. 234, *post*) are limited.

boundaries of counties or county boroughs, which require confirmation by Parliament.

A.

Organisation of Counties.

Terminology. It is one of the most confusing features of local government that different institutions are called by the same name. The county affords an example. For parliamentary purposes, for local administration and taxation, and for military organisation, the term "county" is used to describe areas which are not necessarily coterminous. The term is also used of the local civil court, the county court, though here the divisions make no pretension of corresponding with the county as depicted on the map of England. Again, the term is used to distinguish those boroughs which, by virtue of possessing a population of a certain size, are separated for administrative and parliamentary purposes from the area of the county in which they are situated. The county borough of Salford is in the County Palatine of Lancaster, the county borough of Croydon in Surrey; yet for local government administration these places are, practically speaking, separate units from their respective counties.

Apart from the administrative services of the elected authorities, the organisation of the county comprises the following offices:

The Lord-Lieutenant. Formerly a military representative of the King and, as such, commander of the local militia, yeomanry and volunteer forces, the Lord-Lieutenant is appointed by commission. He is usually the President of the county Territorial Army Association. Otherwise little remains of his official military duties, except the power to recommend appointments to first commissions in the Territorial Army.[1] He may appoint not more than twenty Deputy-Lieutenants, subject to the Crown's power to decline approval. The Lord-Lieutenant is the head of the county commission of the peace, and *custos rotulorum* (keeper of the records). He recommends to the Lord Chancellor with the assistance of an advisory committee, suitable persons in the county for appointment as justices of the peace, except in such boroughs as have a separate commission of the peace.

The Sheriff. The Sheriff is also a royal representative, who in former times played a far more important part in county affairs than to-day. As conservator of the King's Peace he had a duty to suppress riots, to

[1] For position of Territorial Army during Second World War, see p. 342, *post*.

repel invasion and pursue felony and could call on the *posse comitatus*[1] to assist him. He is still, however, the Crown's agent for the execution of processes of law. He summons juries, executes the judgments of the superior civil courts, and is responsible for the carrying out of death sentences.[2] As a revenue official he collects the Crown debts, such as fines and forfeited recognisances and bonds. He is the returning officer in the county parliamentary elections to whom writs for the election of members of Parliament are addressed. His duties, as such, may be, and generally are performed by the clerk of the county council as acting returning officer. He is in attendance on the judges of Assize. Some traces remain of the Sheriff's greater importance in former times. The office is compulsory. Selection is by the Crown from among three persons for each county nominated by a special court which meets annually on November 12. One of these names is subsequently " pricked " by the King at a special meeting of the Privy Council. This court is a kind of reproduction under a modern statute of the old Exchequer. Those entitled to sit are the Lord Chancellor, the Chancellor of the Exchequer, the Lord President of the Council, and other Privy Councillors, the Lord Chief Justice and two or more High Court judges. The qualification for the office is the holding of sufficient land within the county to answer for any damages that may be awarded against the Sheriff for neglect of duty. Various persons are exempted from the office, such as members of Parliament and officers on the active list of the regular forces. The expenses of a Sheriff are such that in these days many qualified persons seek to be excused. No remuneration is payable, though the Sheriff is entitled to certain fines and a percentage of the Crown debts collected.

The Under-Sheriff. The Deputy-Sheriff.

The Sheriff must appoint an Under-Sheriff and a Deputy-Sheriff. In practice he performs none but the ceremonial duties of his office in person. His legal representative for local business is the Under-Sheriff, usually a solicitor, whose firm practises in the county town. The Deputy-Sheriff is the Sheriff's London agent, who must have an office within one mile of the Inner Temple Hall. The purely ministerial work, such as levying executions, is carried out by bailiffs.

The Coroner.

The Coroner is appointed by the county council. It is his duty to hold enquiries into cases of sudden death and discovery of

[1] The county levy, now obsolete.

[2] Other sentences of criminal courts are carried out by prison officials or the police, but the Sheriff remains responsible for carrying out any order unless the duty is imposed on someone else: *The King* v. *Lydford*, [1914] 2 K.B. 378. Committals for contempt of court are carried out by the tipstaff, an officer of the court. The Sheriff executes the judgments of civil courts through the bailiff, a Sheriff's officer.

treasure trove.[1] His salary is paid out of county funds. Larger counties appoint more than one coroner, the county being divided for this purpose into districts. Coroners must be barristers, solicitors, or legally qualified medical practitioners of five years' standing: Coroners (Amendment) Act, 1926. Some cities and boroughs have the right to appoint their own coroners.

Justices of the Peace.

Justices of the peace for the county, as we have already seen, are appointed by the Crown, advised by the Lord Chancellor on the recommendation of the Lord-Lieutenant, who is assisted by an advisory committee. The court of quarter sessions is held by all the justices of the county, and sometimes sits in two courts. A court of petty sessions is formed by at least two justices, sitting together in a regular court-house.

The county is divided into separate divisions for petty sessional purposes.[2] We are not concerned here with the judicial duties of the quarter and petty sessions.[3] Since the Local Government Acts of 1888 and 1894, only a few administrative powers remain vested in justices of the peace. They have, however, certain powers in connection with licensing and visiting mental hospitals, visiting prisons and the administration of the licensing law.

Clerk of the Peace.

Until the Local Government (Clerks) Act, 1931, the clerk of the peace, to which office appointment was made by the standing joint committee of the county council and quarter sessions, was also the clerk of the council of the administrative county, holding the latter more important office by virtue of tenure of the former. By that Act future appointments to the two offices are to be by separate bodies, the county council appointing its own clerk, quarter sessions its clerk of the peace. The two offices may still be, and usually are, held by the same person. The clerk of the peace is an officer of the judicial county and acts as clerk of quarter sessions. The clerk of the county council is also the electoral registration officer of the parliamentary county, but not of the separate parliamentary boroughs within the county.

The County Council.

The administrative county came into existence in 1888. The Local Government Act of that year had for its principal object the transfer of county administrative business from the justices of the peace sitting in quarter sessions to elected bodies. The same Act created the county borough which, for most administrative purposes, is a separate county, while remaining for other purposes, *e.g.* judicial, within the geographical county in which it is situated. Including London, which is a separate unit, there are sixty-two administrative

[1] Treasure trove, which consists of objects of gold or silver which have been hidden and of which the original owner cannot be traced, is the property of the Crown. The finder receives back the objects or their market value, provided he reports his discovery promptly to the Coroner of the district.

[2] P. 195, *ante*.

[3] Part V., Chap. 1.

counties in England and Wales, and eighty-three county boroughs. It is not proposed to give separate treatment to the county borough.[1] The trend of development is to centralise local services under the administrative county and county borough to the exclusion of the lesser local authorities, some of which (boards of guardians) have been superseded, and others (district councils) deprived of some of their important powers, but public health, housing and town and country planning—the first-named the core of local government—are still mainly administered by the county districts.[2]

In each administrative county there is an elected county council, and in each county borough there is an elected borough council.

Composition of County Council.

The county council consists of a chairman, aldermen and councillors, in the proportion of one alderman for every three councillors. A county council must hold four meetings in a year, including the statutory annual meeting.

Executive Officers.

The chief executive officers [3] are the clerk of the council, the county accountant, the medical officer of health, the surveyor, the chief education officer, and other officials, technical experts or inspectors with qualifications suitable to their specialised spheres. The chief constable of the county is appointed, subject to the approval of the Home Secretary, by the standing joint committee of the county council and quarter sessions. It may be remarked that the clerk of the council is the officer upon whom largely depends the efficiency of county administration. He is usually a solicitor with special training in local government work.

Committees.

Local authorities may appoint committees for general or special purposes, and may delegate to a committee any of their functions, except the power to levy rates or borrow money. A committee may, with the exception of the finance committee, include, up to one-third of its number, persons who are not members of the local authority. Committees must be appointed by county councils for the following purposes: finance, education, public assistance, public health and housing, agriculture, child welfare, mental deficiency and valuation for rating purposes.

Delegation.

A county council has power to delegate to the council of a county district as agent those of its functions for which it is not required by law to appoint a committee, but may not delegate the power to levy a rate or borrow money. Local authorities may establish joint committees.

[1] See Local Government Act, 1933, s. 139, for the conditions for the creation of new county boroughs, and see p. 227, *ante*.

[2] There has been a tendency in modern legislation to give to county councils some power of co-ordination and oversight over certain functions of district councils, *e.g.* town and country planning, housing and water supply, coupled with powers of financial assistance.

[3] See Local Government Act, 1933, Part IV., for officers of local authorities.

Powers and Duties.

The principal powers and duties of county councils relate to highways, including county bridges, main and classified roads and all roads in rural districts; education; public assistance; police; special health and agricultural services. They also control the activities of the district councils in public health. In addition there are a large number of minor administrative services provided and regulative duties performed by a county council. County borough councils are organised in the same way as non-county borough councils. They have the powers of county councils and in addition certain powers of non-county boroughs, *e.g.* they are urban sanitary authorities.

B.

Organisation of Boroughs.

Boroughs.

Municipal boroughs, of which there are in all 421 in England and Wales, are corporations consisting of a mayor, aldermen and local government electors. They are governed by a council, to which the electors elect councillors to represent them for triennial periods. The borough council thus consists of the mayor, aldermen and councillors.

Charters.

Boroughs are, and always have been, created by royal charter, but they are subject, like the statutory authorities, to the provisions of the Local Government Act, 1933, regulating their constitution and general powers. A charter of incorporation is sought by an urban district council by petition to the King. The petition is considered by a committee of the Privy Council; notice of the petition must first be given to the county council concerned and to the Ministry of Health. The effect of the charter when granted is, apart from transitional arrangements, *e.g.* for initial elections, to extend the relevant provisions of the Local Government Act, 1933, to the new borough.

Justices.

The majority of boroughs have a separate commission of the peace, justices being appointed by the Crown advised by the Lord Chancellor on the recommendation of the borough advisory committee. The Crown may grant such boroughs a separate court of quarter sessions, with a salaried Recorder appointed by the Crown,[1] to hold office during good behaviour, but paid out of borough funds. The mayor, who is elected annually by the council, and his immediate predecessor are justices of the peace for the borough (the latter for one year), while the mayor is also, except in the case of county boroughs, a justice for the county. The grant of a separate commission of the peace enables the borough justices

[1] Also a clerk of the peace who is appointed by the council.

to act as a separate petty sessional division, and in practice the county justices do not sit as a rule at the borough petty sessions.[1] Borough justices have their own clerk, sometimes the town clerk, sometimes a separate officer. A borough council may apply to the Crown for the appointment of a stipendiary magistrate.

Committees.

Borough councils like county councils work through committees but, unlike county councils, they are not obliged by statute to appoint certain committees for particular purposes [2] except that they must appoint a watch committee to supervise the borough police.[3]

Executive Officers.

The senior official of the borough council is the town clerk, who, like the clerk of the county council, is the head of the council staff. He is its legal adviser, and countersigns all orders for payments made out of the general rate fund of the borough. His office is essential for the due performance by the council of its duties. The other officials are the borough treasurer, the medical officer of health, the surveyor, the chief constable (if the borough possesses a separate police force), and other officers such as technical experts and inspectors.

Work of the Borough Council.

The functions of the borough council are various. The council is the local authority under the Public Health Acts. It is also the housing authority and maintains the non-county roads. The corporate lands and buildings are vested in it with powers of management. Many boroughs possess a separate police force managed by the watch committee of the council. Many of the most important powers of the larger boroughs are derived from adoptive Acts or from private Acts. Powers acquired in this way relate to public utility undertakings, such as gas, water, electricity services, the running of omnibuses and tramways, the provision of local docks, harbours and markets, and many other amenities of a public character.

Cities.

Every city is also a municipal borough. Certain towns have at various times been called " cities " by royal charter or letters patent. Such towns are usually the cathedral towns of ecclesiastical dioceses or very large towns such as Leeds and Bradford. There are also a few counties of cities, or counties of towns, formerly regarded as counties by themselves. At the present day these have separate sheriffs, and in some cases separate commissions of Assize.

[1] County justices probably have no jurisdiction where a borough possesses a separate court of quarter sessions, and cannot sit at borough petty sessions where the borough was exempt before the Municipal Corporations Act, 1835.

[2] P. 231, *ante*.

[3] P. 163, *ante*.

C.

Organisation of Urban and Rural Districts.

Urban and Rural District Councils.

The administrative county, which does not include the county boroughs, is divided into urban and rural county districts. The former are municipal boroughs and urban areas not forming part of a borough (urban districts). Each of these county districts has its elected council. As regards administrative powers the two types of urban authorities do not greatly differ, but there are some differences between the powers of urban and rural district councils. Both are pre-eminently public health authorities, but the latter have somewhat smaller powers. Both rural and urban district councils were established by the Local Government Act, 1894. They replaced a confusing variety of public bodies which sprang up during the nineteenth century, such as local boards of health and rural sanitary authorities. They were, in a reorganised form, the sanitary authorities which were established in 1872. Their powers are exclusively statutory and are derived mainly from the Public Health Acts, 1875 to 1936, the Housing and Town and County Planning Acts, and similar Acts. They are accordingly the local public health, highway (in urban districts) and housing authorities, subject in the case of highways to important powers vested in the county council. Urban councils have powers to regulate buildings and streets, to provide gas and electricity, public parks, libraries and allotments. Many powers can be obtained by the adoption of Acts empowering the provision of public amenities or conferring increased regulative powers on the council. Both urban and rural district councils have been since 1925 the rating authorities. County councils have to address their demands for rates (precepts) to them, though the county councils provide county valuation committees to assist the committees of each assessment area towards securing uniformity of rating throughout the county.

The chief officer of both urban and rural district councils is the clerk, usually, like the town clerk and the clerk to the county council, a solicitor.

Parish Councils.

In rural areas only there is a further unit—the parish council—elected by the local government voters of the civil, not the ecclesiastical, parish. The parish council is entrusted with the management of parish property and certain public health powers. More extensive powers may be obtained under certain adoptive Acts, *e.g.* the provision of street lighting, recreation grounds, public baths and wash-houses, and libraries (the latter in default only of provision of library facilities by the county council).

All rural parishes have parish meetings, but in smaller parishes there is no parish council and the parish meeting exercises some of the powers of a parish council. The parish meeting appears to be the only example of direct, as opposed to representative, government in the English constitution. Parish Meeting.

D.

Local Government of London.

The administrative county of London was created, like other administrative counties and county boroughs, by the Local Government Act, 1888, and the metropolitan boroughs, which cover the same area, by the London Government Act, 1899. The London Government Act, 1939, for most purposes takes the place for London of the Local Government Act, 1933. Administrative County of London.

The City of London stands apart. It is unaffected by the Municipal Corporations Acts and is still governed partly under its old charters. Its status is that of a metropolitan borough with special privileges; the London County Council is the local education authority. The lord mayor, aldermen and common councillors form the Court of Common Council. The aldermen and common councillors are elected at the wardmotes, the former for life, the latter annually, by the local government electors of the ward; formerly membership of a ward was confined to the liverymen of the city companies or guilds. For some purposes the Court of Aldermen forms a separate council. City of London.

The metropolitan borough councils, though acting as the public health authorities for their areas, do not stand in the same relation to the London County Council as do the councils of non-county boroughs to their county councils. The London County Council is the education authority for the whole area. It is also the housing authority, though the borough councils have certain powers under the Housing Act, 1936. Like other county councils it became the public assistance (poor law) authority under the Poor Law Act, 1930. The subject of local government in the Metropolis is too specialised for further treatment in this book. It may, however, be noted that certain local services for London are provided by separate authorities, *e.g.* the Metropolitan Police controlled by the Home Office, the water supply by the Metropolitan Water Board, passenger traffic by the London Passenger Transport Board, while the river Thames, up to a point beyond the metropolitan area, its docks and wharves, comes under the Port of London Authority. The size of the greatest urban centre in the world is sufficient to justify the existence of a distinctive organisation for local government purposes. London County Council and Metropolitan Borough Councils.

E.

Scotland.

Department of Health.

The Secretary of State, as the head of the Scottish Department of Health, takes the place of the Minister of Health in England and Wales as regards the local government of Scotland, which has a separate history. The reforms of 1929 have been applied by the Local Government (Scotland) Act in modified form.

Local Councils.

Elected town councils date only from 1833, though many of them then took the place of corporations with ancient charters. County councils were introduced, as in England, in 1889, replacing the justices of the peace and the commissioners of supply. The Local Government (Scotland) Act, 1929, abolished a number of *ad hoc* authorities in favour of the elected councils. The district council corresponds to the English parish council. The local government franchise embraces all parliamentary electors, as in England, and ratepayers, being the owners and occupiers of heritable property of £10 annual value, lodgers with a similar qualification and all inhabitant occupiers of dwelling-houses, if not registered as parliamentary electors. Registration as an elector or residence are in general the qualifications for election to a council. Any person interested in a contract (other than a loan of money) with the council is disqualified. The services, and methods of administration and of control in the main resemble those in force in England. There are important differences in regard to licensing jurisdiction. The system of appeals against assessments to rates is simpler than in England. There is no appeal beyond the Land Valuation Appeal Court (three judges of the Court of Session) which hears appeals from valuation committees of town and county councils. There are no aldermen. One-third of the town councillors retire each year. County councillors are elected every three years at a single election.

No attempt has been made to discuss in detail in this brief outline of local government organisation the powers and duties of the various authorities in relation to the services rendered by them. The reader is referred to Wright and Hobhouse, *Local Government and Local Taxation*, for a concise account of such topics as public assistance, highways, education, public health, housing, pauper lunatics and licensing. Hart and Hart, *Introduction to the Law of Local Government and Administration*, contains a full account of the whole subject-matter of this Part.

CHAPTER 3.

LOCAL GOVERNMENT ELECTIONS, LEGISLATION AND FINANCE.

THE Local Government Act, 1933, contains a uniform code for the constitutions of local authorities and provides them with a framework of powers of a general character, thereby repealing a large number of statutory provisions governing separate authorities and amending the law as far as necessary to produce uniformity. It does not deal with specific statutory powers relating to particular services, such as public health or education.

A.

Local Government Elections.

Local Government Franchise.

Prior to 1945 the local government franchise rested on the occupation of land or premises, including unfurnished lodgings. The right to vote at a local government election was thus broadly coincident with liability to assessment for rating purposes. The Representation of the People Act, 1945, giving statutory force to the recommendations of the Speaker's Conference of the previous year, extended to parliamentary electors as such the right to be registered and to vote as local government electors. The Act did not, however, assimilate the two franchises, since it preserved the previous local government franchise both in England and Wales and in Scotland for those owners and occupiers who do not qualify for the parliamentary franchise by reason of residence in, or occupation of, the qualifying premises and for peers who are disqualified from voting at parliamentary elections.

Thus the total number of local government electors outnumber the parliamentary electors. The register for local government electors is published annually on October 15 and consists of two parts—

(1) The general register of parliamentary electors;
(2) The ratepayers' register, comprising those who are only qualified to vote at local government elections.

The qualifying date for inclusion in the register is July 31.[1] The register as a whole remains in force for local government elections

[1] June 30, if the Parliamentary Electors (War-time Registration) Act, 1944, is renewed by resolution of Parliament before December 31, 1945.

held during the twelve months following publication unless during that period a new register (the general register) is prepared for a parliamentary election in the same local government area. In that event the later general register supersedes the corresponding part of the annual register for local government elections.

Qualifications.

There are three qualifications for elected membership of local authorities, which is confined to British subjects of full age:

(i) Registration as a local government elector within the area of the local authority;

(ii) Ownership of freehold or leasehold property within the area;

(iii) Residence for the whole of the twelve months before the election within the area of the authority.

Disqualifications.

The chief disqualifications are:

(i) The holding of paid office under the council concerned;

(ii) Bankruptcy, unless certified not to be attributable to the debtor's misconduct, or composition with creditors.

(iii) Receipt of poor relief within twelve months preceding election, or since election;

(iv) Imprisonment for an offence for not less than three months without option of a fine within five years before election, or since election;

(v) Surcharge (consequent upon disallowance of expenditure) of more than £500 by a district auditor within the same periods; [1]

(vi) Under enactments relating to corrupt or illegal practices at elections.

Formerly it was a disqualification to have an interest in a contract placed by the authority: *Lapish* v. *Braithwaite*, [1926] A.C. 275. But such a pecuniary interest now only disables a member of a council from discussing or voting on any question with respect to the contract: Local Government Act, 1933, s. 76. Beneficial interest in stock or shares of a contracting company is deemed to be such an interest. A member is not disabled from voting because of his interest in a question as a ratepayer or tenant of a council house or as an ordinary consumer of gas, water or electricity; nor does any liability attach because of an interest in any matter relating to the terms on which the right to participate in any service, including the supply of goods, is offered to the public. Interests have to be disclosed to the clerk of the authority, who is under a duty to keep a record of such disclosures.

County Council Elections.

Councillors are elected to county councils triennially in single member electoral divisions. Elections are held for each administrative county as a whole every third March. County aldermen are elected by the councillors for six years, one-half retiring by rotation at every triennial election of the council.

[1] P. 246, *post*.

Councillors of borough councils, whether county or non-county boroughs, are elected every year for three years, one-third retiring by rotation each November. Aldermen are elected by the council for six years, one-half retiring triennially. Borough Council Elections.

The councillors of district councils likewise hold office for three years and retire by thirds each year, but the county council may, on the application of the district council, provide for simultaneous retirement every third year. The elections for these councils are held shortly before April 15. Urban and Rural District Council Elections.

B.

Legislation affecting Local Authorities.

A local government authority is a body corporate constituted by Act of Parliament and endowed with statutory powers. Municipal corporations form an exception in that they are created by royal charter which incorporates the inhabitants or the mayor, aldermen and burgesses, the authority itself not being incorporated; the charter can only confer upon the corporation the status permitted by the Local Government Act, 1933, and cannot enlarge the statutory powers of the authority. County councils, urban and rural district councils, parish councils and meetings, have all been created by statute. The Acts which constituted these bodies differed in character. The Municipal Corporations Act, 1882, regulated all the activities of the corporation, as such, acting through the borough council, but did not affect the statutory functions of the council as the public health, housing or other authority for a specific service. On the other hand, the Local Government Act, 1888, enacted general provisions to cover all the functions of a county council, whether conferred by the Act or by other statutes. The Local Government Act, 1933, provided a general code for the constitution and common powers of all local authorities and accordingly effected substantial amendments to the earlier Acts. By common powers are meant such matters as making by-laws, holding property, making contracts, the audit of accounts and finance (excluding rating and exchequer grants). Constituent Acts.

Acts relating to the functions of local authorities confer the special powers necessary for their performance; they are capable of a twofold division: general Acts and adoptive Acts. Acts relating to particular Services.

By the first type of statute a local authority is given many compulsory powers and duties which it is both empowered and compelled to perform, as for example its chief powers and duties under the Public Health Acts, 1875 and 1936, as public health authority, or under the Poor Law Act, 1930, as public assistance authority. Even in a general Act some of the powers are optional. General Acts.

Adoptive Acts.

An adoptive Act confers powers which may be utilised by a local authority at its option; once adopted the powers must be exercised as rigidly in conformity with the terms of the statute as those conferred by a general Act strictly so-called. By way of example the Public Libraries Acts, 1892–1919, may be cited. The local authorities which are given the opportunity of adopting the Acts need not do so, unless they so elect, but having elected, the library facilities provided are limited by the terms of the Acts.

Private Acts.

The legislation discussed above is enacted by means of public general Acts. We must now examine private or local Acts. The private Act has been one of the means whereby Parliament has exercised control over local administration. The constituent and general Acts for this purpose are a comparatively modern method, dating from the period succeeding the Reform Act, 1832. Private Bill legislation is much older; the process was utilised by local authorities most actively during the nineteenth century and is still freely resorted to for the purpose of acquiring additional powers peculiar to a local authority's own area. It is to be observed that, despite the introduction throughout local government of representative councils, elected on a wide suffrage, Parliament has never been prepared to concede to those bodies the right of determining the powers needed for the local requirements of their areas without reference to the legislature. Some critics consider that local administration should be unfettered in matters where neither national interests nor the interests of other authorities are involved. A private or local Act of Parliament, though it passes at one stage through an essentially different type of procedure in Parliament resembling litigation between its promoters and opponents,[1] is as much the law of the land as a public general Act. The difference lies in the local effect of the law it enacts. Herein lies its utility for enabling a local authority to obtain parliamentary sanction for powers not exercisable under a general or adoptive Act. The larger municipalities and public utility undertakings generally, *e.g.* the railway companies, constantly enlarge their powers by this method. Private Bills promoted by municipalities are usually of the omnibus type and embrace a great diversity of provisions. To take an example at random, the Nottingham Corporation Act, 1929, is entitled:

> An Act to authorise the Lord Mayor, Aldermen and Citizens of the City of Nottingham, and County of the same City,[2] to construct sewerage and sewage disposal works, street works and waterworks, to purchase lands compulsorily for various purposes, to extend the limits of the Corporation for the supply of water, to empower the Corporation to run trolley vehicles on further routes, to confer further powers

[1] Part III., Chap. 3, C.

[2] P. 233, *ante*.

upon the Corporation with regard to streets and buildings and the health and good government of the City and for other purposes.

Provisional and Ministerial Orders.

In addition to the promotion of private or local Bills there are two other ways open to local authorities, as well as to undertakings seeking statutory powers for the conduct of public utility services such as water, gas and electricity, whereby statutory powers of a local character can be obtained. The older of the methods, which dates from the mid-Victorian legislation relating to public health, is known as provisional order procedure.

Provisional Orders.

A provisional order is an order made by a Minister on the application of a local authority or statutory undertaker where Parliament has sanctioned this course for a particular purpose by a general Act. The order is provisional in the sense that it requires express confirmation by Parliament before it operates to confer the powers sought. This is given by a Provisional Order Confirmation Bill, which is a public Bill introduced by, or on behalf of, the Minister concerned. Opponents of the order may be heard at two stages. In the first place, if any objections are put forward by interested parties as a result of the advertisement of the application which is a necessary preliminary to its promotion, the making of the order by the Minister is preceded by a public enquiry conducted by an official appointed by the Minister who is usually an officer with specialised knowledge of the subject-matter at issue. Again, while the Confirmation Bill is pending in either House of Parliament, a petitioner can appear before the select committee to which the Bill is referred. The procedure thereafter follows the lines of that for private Bills. It has been used extensively under Acts relating to public health, water supplies and the extension of boundaries of local authorities. It is less expensive than the promotion of a private Bill and usually ensures that the promoter can learn the strength of the opposition he is likely to meet at an early stage. At the same time it preserves to Parliament the right, which is seldom exercised in practice, to reject or to amend the Confirmation Bill.

Ministerial Orders.

The second method requires either no action by Parliament or only a simple resolution of each House before the order becomes law. While Parliament can reject the order either by passing a resolution for its annulment or by declining to approve an affirmative resolution, where this requirement is prescribed, it cannot amend any provision that is contained in an order. This type of order is made by a Minister to confirm a scheme put before him by the applicant after public enquiry. It is sometimes called a special order or simply a ministerial order. An example is to be found in the confirmation of a clearance scheme made by a local authority under the Housing Act, 1936. From the point of view of the opponents of the scheme, the objection to this procedure is that

there is no opportunity of putting their case before a select committee in Parliament, if the Minister overrules the objection which they have put forward at the public enquiry.

Neither of these methods is wholly appropriate where both a measure of central control by Parliament is desirable on grounds of national policy and at the same time speedier action is required than is available for the passage of an opposed Provisional Order Confirmation Bill. The Government in 1945 introduced a Bill in which provision is made, which, while preserving the right of interested parties to be heard before a parliamentary committee on objections to detail, would afford an opportunity to any member of Parliament to raise on the floor of the House any question of general policy that might be involved; the Statutory Orders (Special Procedure) Bill.[1]

By-Laws.

By-laws are an important means whereby a local authority exercises its regulative functions. A county council and a borough council possess power to make by-laws for the good rule and government of their areas and to prevent and suppress nuisances not already punishable, though no local authority has an inherent power to initiate legislation by this means. The Public Health Acts, 1875 and 1936, and other statutes confer upon public health authorities statutory power to make by-laws and regulations. There are various restrictions on the power to make by-laws, such as a limit on the penalty to be prescribed for breach. By-laws normally require confirmation by the Minister of Health or by the Home Office, as the case may be. In consequence of this requirement it is the practice to adopt, with or without modification, model sets of by-laws drawn up by the confirming authority. The courts may declare a by-law invalid, either as being *ultra vires* or as being an unreasonable exercise of power: *Kruse* v. *Johnson*, [1898] 2 Q.B. 91; K. & L. 26.[2] The Town Police Clauses Acts, 1847 and 1889, consolidate the usual provisions which were formerly to be found in Acts for the police regulation of towns. The Acts enable a variety of by-laws to be made for traffic control, public vehicles, street regulation, lighting and kindred subjects.

C.

Local Government Finance.

Sources of Revenue.

There are four principal sources of revenue available to meet the needs of a local authority: (i) rates, (ii) contributions from the Central Government and other local authorities, (iii) loans, and

[1] The Bill was read a second time in the Commons before the Dissolution.
[2] P. 278, *post*.

(iv) fees, charges, and income from trading undertakings and from estates.

Rates. Rates are a species of local taxation payable by the occupiers of land and buildings. The amount varies with the annual value of the property. There are certain total or partial exemptions. Agricultural land no longer pays rates, while property used for productive, industrial or freight-transport purposes is rated at a quarter of the normal figure.[1] The purpose of these exemptions is to relieve industry of some of its burdens.

Rateable Value. A rate is assessed upon the annual value of land or buildings. This value represents the rent at which the property might reasonably be expected to let from year to year, less the annual cost of repairs, insurance and other expenses. The law thus assumes the existence of a hypothetical tenant, and calculates what sum he would be prepared to pay for a lease on such terms. Special methods are provided for calculating the value of large undertakings, such as railways, waterworks, harbours and mines.

Mode of Assessment. The mode of assessment is prescribed by the Rating and Valuation Act, 1925. The district councils are the rating authorities for all purposes of local government. Rating is thus a principal function of the councils of all boroughs (including county boroughs), urban districts and rural districts. County councils address their demands for rates to meet county expenses to the rating authorities in their areas. In rural areas these expenses constitute the major part of the total rate. A valuation list, containing particulars of all interests in land, including buildings, within the rating area and the names of the occupiers, is prepared by the officials of the rating authority for the valuation committee. There is an assessment committee (usually for a combined district of rating areas except in county boroughs) which receives the draft valuation list and hears objections raised by any occupier affected before finally approving the list. An objector may appeal from the committee to the rating appeal committee of Quarter Sessions of counties or to the Recorder of a borough, and thence, on a case stated, to the Divisional Court of the King's Bench Division, and through the Court of Appeal up to the House of Lords. Subject to certain contingencies, the valuation list remains in force for five years. The rating authority levies the rate to meet the expenses of a fixed period, usually six months, on the current list. The rate is a uniform amount in the £ on the value of each unit (hereditament) of land and buildings. This is the general rate for the district and includes the expenses both of the rating authority itself, of the county council and other precepting authorities. Special rates are leviable on the

[1] Local Government Act, 1929, and Rating and Valuation (Apportionment) Act, 1928.

same basis on separate areas in rural districts, *e.g.* where a charge has been incurred under an adoptive Act, such as for street lighting, which only benefits a particular part of the district. In urban areas such expenses are included in the general rate, since the services are in theory available for all ratepayers. The water rate is levied separately on a different basis. Parish councils and parish meetings are restricted as to their normal expenditure to the proceeds of a fixed rate, in the case of parish councils 8*d.* in the £ of rateable value, exclusive of expenditure on powers under adoptive Acts but including debt charges. Payment of rates is enforced by summary proceedings before justices of the peace.

Uniformity of Assessment.

An attempt was made by the Act of 1925 to secure greater uniformity in assessment. Under this Act every county council must appoint a county valuation committee, containing representatives of each assessment area in the county, to promote uniformity in valuation and to assist the rating authority and assessment committee in each area. A central valuation committee has been appointed by the Minister of Health to act in an advisory capacity, so as to secure co-ordination of rating throughout the country and to make recommendations for the valuation of cases of special difficulty. This body has issued reports containing many valuable recommendations.

Contributions from the Central Government.

Before 1930 certain national taxes and the proceeds of certain licences collected by county and county borough councils were granted to those bodies out of the local taxation account of the Exchequer. Various grants were also made for education, for modern health services and for the upkeep of the roads, the latter from the proceeds of motor registration, taxes and fines for motoring offences. By the Local Government Act, 1929, there are paid annually to the councils of counties, county boroughs and county districts, in lieu of most of these sources of revenue and to compensate for losses from the rating relief given to industry, contributions to local government expenses from funds provided by Parliament. These are called general exchequer grants. The total amount contributed from the Exchequer for this purpose is determined by a notional fund or pool, called the general exchequer contribution, provided out of general taxation. It consists of three items: (1) An amount equal to the total losses of all counties and county boroughs on account of such rating relief, (2) an amount equal to the total losses on account of discontinued grants for separate services, and (3) an amount fixed periodically by Parliament; Local Government Act, 1929, s. 86. The block grants under (3) are determined by an elaborate formula weighted so as to take into account varying local conditions and requirements, such as the numbers of children under school age

General Exchequer Grants.

and of unemployed persons. The system is designed to make a general contribution from the Exchequer towards the cost of local services adapted to the needs of each area. It leaves a large measure of freedom to local administration and initiative, but at the same time provides for adequate general control by the Central Government, which has the power to withhold grants if the standard of efficiency is not maintained. The police, housing and education grants and some of the road grants from the Central Government have not been affected by the Local Government Act, 1929, and are paid separately for each of these services.

Loans.

Just as a trading company increases its capital by borrowing on the security of its assets to finance further developments, so a local authority, subject to strict statutory regulations, may raise loans for the purpose of financing its permitted activities. The security offered is that of the fund formed by the revenue under the authority's control. The power to borrow may be conferred in three ways. By the general law borrowing powers for purposes which local authorities are empowered to carry out are given subject to the sanction of a government department, usually the Ministry of Health. In the second place, loans authorised by local Acts are raised by the larger urban authorities; in this way powers may be obtained over and above those conferred by the general law. Borrowing powers conferred by local Acts may be made exercisable without the sanction of a government department, if the estimates are proved before the select committee of Parliament which considers the Bill. Thirdly, a provisional order may confer borrowing powers, in which case the previous consent of a government department is required, as well as parliamentary sanction.[1]

Other Revenue.

Other sources of revenue may be briefly noted: profits from public utility undertakings (chiefly confined to urban authorities), *e.g.* gas, water, electricity, omnibus and tramways; income from other corporate property, fines imposed by courts of summary jurisdiction, and miscellaneous fees.

Audit.

Departmental control over local authorities in finance is not exclusively exercised through the payment of the general exchequer grants. District auditors of the Ministry of Health conduct annual audits of the accounts of local authorities, with an important exception in the case of the general accounts of some of the boroughs. These auditors, though civil servants, are not mere

[1] Since 1939 borrowing powers have been virtually suspended (apart from replacement of maturing loans). In particular the control of capital issues has prevented borrowing in the open market. During the years succeeding the end of hostilities local authorities can, with some exceptions, only borrow from the Local Loans Fund. This fund is under Treasury control, and will thus ensure capital expenditure of local authorities being kept in line with other capital outlay on public account; Local Authorities Loans Act, 1945.

agents of the Minister and in the performance of their duties exercise a quasi-judicial function. Expenditure incurred without statutory authority must be disallowed by the auditors, as well as excessive expenditure upon lawful objects. Illegal payments are surcharged personally upon those who have authorised them —the elected representatives. A surcharge of over £500 disqualifies the person surcharged from membership of the local authority concerned.[1] In the case of boroughs expenditure on public assistance, education and housing, if a housing subsidy is payable, is subject to district audit. Other municipal accounts are audited by two borough elective auditors and a mayor's auditor, unless the borough has adopted either the system of district audit or a system of professional audit as authorised by the Local Government Act, 1933, s. 239. In the metropolitan boroughs all accounts are subject to district audit.

[1] For appeals from district auditors, see p. 286, *post*.

PART VII.

ADMINISTRATIVE LAW.

Report of the Committee on Ministers' Powers (H.M Stationery Office, 1932. Cmd. 4060) (cited as *M.P.R.*).

Concerning English Administrative Law, by Sir Cecil Carr (Oxford University Press).

Law of the Constitution, by A. V. Dicey, 9th ed., Appendix, Section I. (Macmillan).

Law and Orders, by C. K. Allen (Stevens).

INTRODUCTORY.

Scope of Part VII.

ADMINISTRATIVE law is the law relating to the organisation, powers and duties of administrative authorities.[1] It was explained at the beginning of this book that the constitutional lawyer can only cover part of the vast field of governmental activities, and that in a work on general principles only principal functions can be discussed in any detail.[2] The organisation and principal functions of the Government and of local authorities have been outlined in Parts IV. and VI. respectively. The royal prerogative has been examined in connection with the Crown in Part IV. In Part VIII. there will be examined the relationship between the citizen and the State in regard to the fundamental freedoms of the person, speech and association. The common law powers of the Executive in times of great emergency are discussed in Part IX.

In this Part there will be studied the general rules which regulate the exercise of administrative powers [3] and the manner in which public authorities are controlled by the courts. Special attention will be paid to two aspects of administrative law which are of particular interest to the constitutional lawyer inasmuch as they involve the relationship between administrative authorities and other organs of the constitution, viz. the delegation of legislative power to administrative authorities (delegated legislation) and the decision by administrative authorities or tribunals of judicial or quasi-judicial disputes (administrative justice).

[1] Dicey, *op. cit.*, p. 478.

[2] Part I., Chap. 1, *ante*.

[3] By "administrative powers" are meant powers exercised by the executive government though the term "an administrative power" is sometimes used as synonymous with an executive as contrasted with a legislative or judicial power (*i.e.* with reference to the nature of the power and not the body by which it is exercised).

CHAPTER 1.

THE NATURE AND CLASSIFICATION OF POWERS.

The meaning of a Power.

IT is necessary for Parliament when conferring a power to determine upon whom it should be conferred and what safeguards should be imposed on its exercise. Such a decision will largely be based on consideration of each particular power and the belief that it will best be exercised by some particular body or person, *e.g.* a Minister, a court of law, or an independent statutory body. None the less some general tests are necessary, and therefore there must be attempted some classification of governmental powers. There will first be discussed the meaning of powers and then the classification of powers as legislative, executive or judicial.

Whether an act be the act of a private individual or a limited company or of a public authority or its servant, the legality of the act will be tested according to law. But public authorities and their officers have powers, as well as duties, which are not possessed by private persons.[1] "A sanitary inspector can enter my house to inspect my drains; my employer can not. A sheriff can summon me to serve on a jury; my friends can not." [2] Both private citizens and public authorities and officers must justify the exercise of a power in the same way; the power must be shown to have originated either from a statute or the common law.

Powers of Private Citizens.

If A.B. does an act which affects the rights of his neighbour, C.D., he must be able to justify his act, if need be, in a court of law. He must exercise his power in the manner prescribed by law, and for the purpose for which the law has sanctioned it. Suppose that A.B., inconvenienced by a branch of C.D.'s tree overhanging his garden, wishes to remove the branch: he must first consider his legal position. Having satisfied himself that he is permitted by law to remove the branch, he must then consider in what particular way the law permits him to do it. Can he, if he wishes, enter his neighbour's garden for the purpose? Can he lop it off without notice? Sometimes the exercise of a power is optional; sometimes there is a legal duty to exercise it. A citizen has duties as a member of the public. Every man is under a duty to assist in quelling a

[1] The powers of public servants are usually powers which they exercise on behalf of the Crown or of Ministers or of public authorities; powers are rarely conferred by statute on subordinate officers themselves (p. 51, *ante*).

[2] Jennings, *The Law and the Constitution*, 3rd ed., p. 292.

breach of the peace, if called upon to aid a constable; he would, for example, be under a duty to assist a police officer who called upon him to assist in arresting a violent offender.[1]

Authority for acts of Public Authorities.[2]

If A.B. instead of being a private citizen is the holder of a public office, *e.g.* a collector of taxes, or a justice of the peace, his official acts must be justified in the same way. For every act performed in the course of a public duty there must be legal authority; or, as it is frequently put, a public authority or public servant must act *intra vires*. Just as a power must be shown to originate either from statute or at common law, so either the statute or common law will determine how it must be exercised and whether the person upon whom a power is conferred is compelled to exercise it or is merely given a discretion to exercise it. The tax collector must be able to show, if his authority is challenged, that Parliament, or a body entrusted by Parliament with the levying of taxation, has conferred the power to collect taxes on holders of his office or on the Crown or the department which he serves; further, he must collect them only in accordance with certain statutory rules. By accepting office he comes under a duty to collect taxes, exercising his power in the manner allowed by law. The same is true of the justice of the peace. He is a member of the Judiciary and administers in particular much of the criminal law. He also performs certain other duties and exercises powers of an executive character. He is empowered by various Summary Jurisdiction Acts to deal judicially with certain offences within limits defined by Parliament. He is under a duty to exercise these powers if called upon to do so, and he can be controlled, if need be, by removal from office or by process in the courts compelling him to exercise his powers.

Classification of Powers—Statutory and Common Law.

The majority of governmental powers are to-day derived from statute. Innumerable statutory powers are entrusted to the King in Council, to separate Ministers or to government departments, to public authorities or to holders of public offices. The chief common law power of the Executive is the royal prerogative[3] whereby Ministers of the Crown are able to exercise on behalf of the Crown certain vital functions of government without express parliamentary authority, though subject to subsequent political responsibility to Parliament. The exercise of prerogative powers is less fettered than is the exercise of statutory powers in that the courts can only enquire into the extent of the prerogative and not into the discretion exercised within its scope.

[1] P. 307, *post*.

[2] For a discussion of the theory of governmental powers and duties, see Stephen's *Commentaries*, 20th ed., Vol. I., pp. 272–88.

[3] Part IV., Chap. 1, C, *ante*.

Classification of Powers—Legislative, Administrative and Judicial.

Governmental powers may be classified in accordance with the three functions of government,[1] *i.e.* legislative, executive and judicial, though it is often impracticable to distinguish clearly between a legislative and executive or between an executive and judicial power.[2] The body upon which a power is conferred affords no reliable test of the nature of the power. The King in Council exercises legislative, executive and judicial powers. Many of the functions of the Judiciary are executive. It may be said that legislation is the making of general rules of conduct, but generality is a question of degree. If the Postmaster-General issues instructions for the guidance of all head-postmasters, is he exercising a legislative or an executive function?[3] The legislative form may be used to deal with individual cases, *e.g.* an Act of Parliament indemnifying an individual from the consequences of an illegal act.[4]

Quasi-Judicial Powers.

Sometimes the exercise of a power involves a process which is partly judicial as well as executive. That part of the process which has a judicial element may be described as "quasi-judicial,"[5] or the whole power may be described as a "quasi-judicial" power. Thus the exercise of an executive power, *e.g.* the confirmation by a Minister of an order made by a local authority, must frequently be preceded by a public enquiry held by an official appointed by the Minister. The holding of the enquiry involves the hearing of evidence, and this resembles the judicial process. It must be conducted in accordance with certain rules known as rules of natural justice. The decision whether or not to confirm the order involves the exercise of a discretion; the Minister must take into account the findings at the enquiry, as well as other relevant factors, *e.g.* general policy in regard to similar orders. Thus the Minister, while to some degree he may be acting as a judge, arrives at his decision not by applying any fixed rule of law, but by exercising his own judgment as to what in all the circumstances is fair and just, having regard to the public interest as well as the private rights of any objectors. "Though the act of affirming a clearance order is an administrative[6] act, the consideration which must precede the doing of the act is of the nature of a quasi-judicial consideration."[7] In general it may be said that a power involves a judicial element wherever it involves the decision of a dispute. When the decision primarily involves the application of law to facts, it is a judicial process. When the final decision primarily involves an exercise of discretion based on policy, it is a quasi-judicial process. To draw the line is not easy, and as a result it has

[1] Part I., Chap. 2, *ante*.
[2] Jennings, *op. cit.*, Appendix I.
[3] Jennings, *op. cit.*, 1st ed., p. 14.
[4] *E.g.* Arthur Jenkins Indemnity Act, 1941.
[5] See also p. 270, *post*.
[6] *I.e.* executive.
[7] *Errington* v. *Minister of Health*, [1935] 1 K.B. 249, at p. 273.

been suggested that a judicial decision is merely a decision which is in fact exercised by the courts in accordance with strict legal procedure, whereas a quasi-judicial decision is given by an administrator or an administrative tribunal entitled to follow its own procedure provided only that the rules of natural justice are observed.[1] Frequently it is determined only as a matter of expediency whether a decision shall be entrusted to a judge or to an administrator,[2] but it is submitted that when the law is being applied to facts (*e.g.* does a citizen fall within the definition of an injured person under a particular statute?) a strictly judicial function is exercised, whether it is in fact exercised by judge or administrator. It is important to use terms accurately. If classification is by function or substance, we use the terms "judicial" and "quasi-judicial" as showing the nature of the decision to be given. If classification is by procedure, we use the term "judicial" when a decision is given by a judge following ordinary legal procedure, and the term "quasi-judicial" when a decision is given by an administrator.

The following examples illustrate the various types of governmental powers:

1. Special Constables Act, 1914, s. 1 (1).

Legislative Power conferred on the King in Council.

> His Majesty may, by Order in Council, make regulations with respect to the appointment and position of special constables . . . and may, by those regulations, provide—
>
> (*a*) that the power to authorise the nomination and appointment of special constables . . . may be exercised although a tumult riot or felony has not taken place or is not immediately apprehended; and
>
> (*b*), (*c*), (*d*) (other purposes for which the regulations may be made); and (*e*) for such supplemental and ancillary matters as may be necessary or expedient for the purpose of giving full effect to the regulations.

2. Police Act, 1919, s. 4 (1).

Legislative Power conferred on a Department.

> It shall be lawful for the Secretary of State to make regulations as to the government, mutual aid, pay, allowances, pensions, clothing, expenses and conditions of service of all police forces in England and Wales, and every police authority shall comply with the regulations so made.

The difference between legislation by Order in Council and legislation by a Minister is one of form, not of substance. In both cases the content of the legislation is framed by a department.

3. Diseases of Animals Act, 1894, s. 15.

Executive Power conferred on a Department.

> The Board (now Minister) of Agriculture and Fisheries may if it thinks fit in any case cause to be slaughtered any animals affected by foot and mouth disease.

[1] Jennings, *op. cit.*, 3rd ed., pp. 274–84.

[2] P. 298 *et seq*

4. Road Traffic Act, 1930, s. 81 (1).

Judicial power conferred on a Minister.

> Any person (here follow five categories of persons who may be aggrieved by the decisions of traffic commissioners or certifying officers) may within the prescribed time and in the prescribed manner appeal to the Minister of Transport.
>
> (2) On any such appeal, the Minister shall have power to make such order as he thinks fit (including an order revoking a licence), and any such order shall be binding upon the commissioners or certifying officer.

In the case of the provision in the Roads Act, 1920, s. 14 (3), which is replaced by the above section, it was further enacted that:

> An order made by the Minister . . . shall be final and not subject to appeal to any court, and shall, on the application of the Minister, be enforceable by writ of mandamus.[1]

Discretionary nature of administrative powers.

The exercise of administrative powers involves in the majority of cases the exercise of discretion by the administrator. Where a single imperative course of action is prescribed, *e.g.* the slaughter of animals affected by foot-and-mouth disease, we speak of a ministerial duty. Discretion involves a choice between two or more courses of action. The judge performing the judicial function of applying an existing rule of law to the facts as found by him (or by the jury) is in a different position from the administrator, unless the administrator is, as is sometimes the case, given a judicial function by statute. The administrator is entitled to arrive at his decision by reference to considerations of policy. There may be precedents which he does not care to ignore. But within the limits of the statutory power which gives him the discretion, he is free to do so if he chooses and his decision cannot be challenged in a court of law on the ground that he has disregarded precedent or the weight of evidence. The forum where his decision can be criticised is Parliament.

Again, it may be the duty of the administrator to exercise his discretion in initiating action. The judge must await a dispute before he can function at all. It is the duty of the administrator to conduct or to supervise the conduct of a particular branch of governmental activity. His is the discretion when to act and, usually, how to act.

Discretionary powers fall into two divisions: (1) those which confer absolute or " executive " discretion, (2) those which confer a qualified discretion sometimes described as " judicial " or " quasi-judicial."

Absolute Discretion.

Under the British Nationality and Status of Aliens Acts, 1914–1943, the Home Secretary may grant a certificate of naturalisation to an alien who satisfies certain conditions. Even if those

[1] Chap. 4, *post*.

conditions are satisfied, his discretion is absolute and against his decision there can be no appeal to a court of law. It appears from the language of the enactment [1] that no process of law could be invoked to compel him to decide or to set aside his discretion even on the ground of bias. During the Second World War power was given to the Home Secretary by a defence regulation [2] to detain anyone whom he had *reasonable cause to believe* came within one of the specified categories which included persons of hostile origin or association. In *Liversidge* v. *Anderson*, [1942] A.C. 206,[3] the plaintiff who had been detained under the regulation brought an action against the Home Secretary for false imprisonment. It was held by the House of Lords, Lord Atkin dissenting, that the court could not enquire into the grounds for the belief which led to the making of the detention order; the matter was one for executive discretion. In regard to a political and not triable issue an objective test of reasonableness could not be applied but only a subjective test and the statement of his belief by the Home Secretary was accepted as conclusive. Lord Wright, however, appeared to accept the view expressed in an earlier case by Tucker, J., that the applicant for a writ of habeas corpus was entitled to challenge the *bona fides* of the Home Secretary by affirmative evidence: *Stuart* v. *Anderson and Morrison*, [1941] 2 All E.R. 665. Perhaps this case may be regarded as an example of a discretion theoretically open to question but in practice absolute. The Home Secretary must have reasonable cause to believe, but the court cannot go behind his statement that he had such a reasonable cause to believe. In every case the degree of discretion conferred by a statute or regulation must be determined by reference to the statute or regulation in question.

Non-absolute Discretion.

Most discretionary powers are not absolute and their exercise may be questioned in the courts. This does not mean that the courts will review the exercise of discretion and substitute their own discretion for that of the body or person to whom a discretion has been entrusted. In the absence of provision for an appeal the proper exercise of a discretionary power cannot be challenged. A discretion which is not absolute must, however, be used in accordance with the rules of natural justice enforceable by the courts; hence the phrase "judicial discretion." [4] The cases which come before the courts are mainly those where discretionary powers have been improperly exercised and it is with the type of exercise of power which involves

[1] British Nationality and Status of Aliens Act, 1914, s. 2 (1).
[2] Defence Regulation 18B; see Part VIII., Chap. 2, *post*.
[3] For full discussion of this and other Regulation 18B cases, see Part VIII., Chap. 2, *post*.
[4] W. A. Robson, *Justice and Administrative Law*, at p. 229. The rules of natural justice do not govern the exercise of legislative powers. The only test to be applied is whether or not they are *intra vires*.

judicial review[1] that the lawyer is primarily concerned. It must, however, always be remembered that the main control of administrative powers is internal. Senior officials control their subordinates and all are responsible to the Minister who presides over the department. It is always open to a person aggrieved to apply to the Minister for a review of a departmental decision. Sometimes it is specifically provided by statute that the decision of an administrative tribunal requires ministerial confirmation or is subject to an appeal to the Minister concerned.[2] Nor is judicial review the sole or even the main external control. Persons aggrieved by administrative decisions will more frequently appeal to their member of Parliament than to the courts and by means of parliamentary questions and other opportunities for criticism[3] the House of Commons is able to exercise a reasonably effective control. Individual grievances are frequently raised on the motion for the adjournment[3] and the possibility of a parliamentary question is an ever present cause of anxiety to civil servants. It must also be borne in mind that those powers, the exercise of which is subject to judicial review, are not normally exceeded or abused. It is the abnormal case which comes before the courts. Just, however, as the courts will prevent an administrator from exceeding his statutory power (acting *ultra vires*) whether the power be executive or judicial, so they will prevent the wrongful exercise of a discretion which is not absolute. Such a wrongful exercise of discretion may arise from bias, from consideration of irrelevant issues, from failure to consider relevant issues, or from improper motives.[4] In *The Queen* v. *Boteler* (1864), 4 B. & S. 959; K. & L. 198, justices refused to order a parish to contribute to the expenses of its poor law union because they disapproved of the Act of Parliament which had annexed the parish to the union. The High Court ordered the justices to issue a contribution order and Cockburn, C.J., said:

> "I do not intend in the slightest degree to encroach upon the doctrine that, where magistrates have a discretionary power to decide whether they will do an act or not, this court will not order them to do it when they have exercised their discretion upon the merits of the matter. But it is clear upon the facts of the present case that they have not exercised that discretion which in law they will have been justified in exercising. . . . They proceeded upon the ground that the annexation of this place to the union was unjust, in other words that the operation of the Act of Parliament under which that was effected was unjust. Their decision virtually amounts to this—'we know that upon all other grounds we ought to issue the warrant,

[1] Chap. 4, *post*.
[2] Chap. 6, *post*.
[3] Part III., Chap. 3, *ante*.
[4] For further consideration of grounds for judicial review, see Chap. 4, *post*.

but we will take upon ourselves to say that the law is unjust, and therefore we will not issue it.' That is not a tenable ground on which this court can allow magistrates to decline to exercise their discretion according to law."

Reasons for stressing judicial control; delegated legislation and administrative justice.

The remainder of this Part (Part VII.) will be concerned with judicial control of the exercise of powers by administrators, delegated legislation and administrative justice. These are the aspects of administrative law which are of primary interest to the constitutional lawyer. They involve the principles of separation of powers, parliamentary sovereignty, the rule of law and the right of access to the courts. They are the topics which raise the fundamental difficulty of reconciling liberty with government. The lawyer, bred in the traditional system of English law with its emphasis upon the supremacy of Parliament and the right of the subject to defend his rights in the courts, is concerned to watch critically the delegation of law-making powers to the Executive and the adjudication of disputes by tribunals not hitherto recognised as part of the established machinery of the State. But it must not be supposed that legislation and adjudication are the only or indeed the main functions of the Executive. Its task is to govern by providing and administering the public services. The removal of legislative power to a central authority subordinate to Parliament and the establishment of a system of administrative tribunals to settle those justiciable issues which are now decided by administrators or tribunals appointed by administrators would still leave the bulk of administrative work to be performed, as at present, by the government departments and other bodies which enjoy a greater or less degree of autonomy in these matters. The main functions of administrators are planning, co-ordinating, supervising and generally exercising a discretion as regards alternative courses of action which are not of a character susceptible of adjudication in court. The real control of these functions lies with the House of Commons and not with the courts.

Ministers' Powers Report.

If this warning be borne in mind, no excuse is needed for the emphasis that will be given to the topics to be studied in Chapters 4, 5 and 6.

"The most distinctive indication of the change of outlook of the government of this country in recent years has been its growing preoccupation, irrespective of party, with the management of the life of the people. A study of the Statute Book will show how profoundly the conception of the function of government has altered. Parliament finds itself increasingly engaged in legislation which has for its conscious aim the regulation of the day-to-day affairs of the community, and now intervenes in matters formerly thought to be entirely outside its scope. This new orientation has its dangers as well as its merits. Between liberty and government there is an age-long conflict. It is of vital importance that the new policy, while

> truly promoting liberty by securing better conditions of life for the people of this country, should not, in its zeal for interference, deprive them of their initiative and independence which are the nation's most valuable assets." [1]

These words, cited at the beginning of the *Report of the Committee on Ministers' Powers*, aptly summarise the policy of the State in modern England and draw attention to the risk inherent in such policy. That this feature of modern government is equally true of the United States of America is shown by the following pronouncement by Chief Justice Hughes of the Federal Supreme Court:

> "The distinctive development of our era is that the activities of the people are largely controlled by government bureaux in State and Nation. It has well been said that this multiplication of administrative bodies with large powers has raised anew for our law, after three centuries, the problem of 'executive justice,' perhaps better styled 'administrative justice.' A host of controversies as to private rights are no longer decided in courts." [2]

The Committee on Ministers' Powers, to which reference has been made, was appointed in 1932 at a time when a storm of criticism was being directed against the departments by the Bench and Bar, by prominent academic lawyers at Oxford and a small section of the House of Commons. The appointment of the Committee coincided with the publication of an essay by the Lord Chief Justice, Lord Hewart.[3] This essay was not so much a piece of research as a destructive criticism by a judge who considered that the courts were losing their historic control of administration through the King's Bench Division. The terms of reference to the Committee were to consider the powers exercised by, or under the direction of (or by persons or bodies appointed specially by), Ministers of the Crown by way of (*a*) delegated legislation, and (*b*) judicial or quasi-judicial decision, and to report what safeguards were desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law. The Committee, which vindicated the Civil Service from the charge of bureaucratic tyranny, made many constructive recommendations of value on the topics of delegated legislation and administrative justice.

[1] *Report of the Committee on Finance and Industry*, Part I., Chap. I., para. 8, p. 415 (Cmd. 3897, 1931), cited *M.P.R.*, p. 5.

[2] See *Cases on Administrative Law*. Edited by Felix Frankfurter and J. F. Davison. Preface (C.C.H. University Casebook Series, New York, 1932).

[3] *The New Despotism* (Benn).

CHAPTER 2.

THE COURTS AND PUBLIC AUTHORITIES.

Liability of Public Authorities.

THE chief function of the courts in relation to the control of public authorities is to prevent an excess or abuse of statutory power. It is also the function of the courts to enforce contracts and redress tortious injuries, and to punish crimes. Apart from its vicarious liability for the negligence of its servants it is seldom that the courts are asked to award damages against a public authority, though they are frequently asked to declare that a particular act is (or is not) authorised by the Act under which it purports to be exercised. None the less the general principles of liability are important and in this section of this chapter there will be discussed their application to public authorities and public servants.

Individual Liability.

In the absence of some special statutory immunity every individual is liable for the commission of wrongful acts and for such omissions of duty as give rise to actions of tort at common law. Obedience to orders does not normally constitute a defence [1] whether the orders are those of the Crown,[2] a local authority,[3] a limited company or an individual employer. The constable who finds himself a defendant in an action for false imprisonment cannot plead that he was acting under the orders of his sergeant in effecting a wrongful arrest. It is, however, seldom that officials of local authorities are sued in tort in respect of acts done in the course of duty without the employing authority being joined as defendant. A plaintiff usually sues the authority because (*a*) the authority is a more substantial defendant, and (*b*) certain statutes [4] exempt the servants of a local authority from being sued in respect of acts done *bona fide* in the course of duty. Actions against servants of the Crown are common owing to the exemption of the Crown itself from liability for tort.[5] The Constables Protection Act, 1750, protects constables who act in obedience to the warrant of a magistrate and do not exceed the authority of the warrant, even though the magistrate has acted without jurisdiction in issuing the warrant. A constable who arrests a person, other than a person

[1] For the position of members of the armed forces under criminal law, see Part IX., Chap. 2, B, *post*.

[2] Chap. 3, *post*.

[3] *Mill* v. *Hawker* (1875), L.R. 10 Ex. 92.

[4] Public Health Act, 1875, s. 265; Public Health Act, 1936, s. 305; Food and Drugs Act, 1938, s. 94.

[5] Chap. 3, *post*.

charged with felony, when an invalid warrant has been issued, but without having the warrant in his possession, has no protection. The Criminal Justice Act, 1925, s. 44, allows arrest without the warrant being in the constable's possession at the time, but this section only applies where a lawful warrant has been issued and the Constables Protection Act does not justify what would, apart from the invalid warrant, be an unlawful arrest: *Horsfield* v. *Brown*, [1932] 1 K.B. 355. The Inland Revenue Regulation Act, 1890, s. 29, affords revenue officers a considerable measure of protection where there is probable cause for the seizure and detention of property.

Liability of Public Authorities.

A public authority, other than a department of the Central Government which represents the Crown, is, like any other employer, liable for the wrongful acts of its servants or agents committed in the course of their employment.[1] It was established by the leading case of *Mersey Docks and Harbour Board* v. *Gibbs* (1866), L.R. 1 H.L. 93; K. & L. 156, that the liability of a public body whose servants negligently execute their duties is identical with that of a private trading company. In spite of the arguments that a corporation should not be liable for a wrongful act, since a wrongful act must be beyond its lawful powers and therefore not attributable to it, it is clear that a corporation is, like any other employer, liable for the torts of its employees acting in the course of their employment. Where, however, the employee's act is *ultra vires* the corporation, there must be express authority from the corporation.[2] Those, however, who are apparently the employees of a public authority are not always acting in that capacity when committing acts which constitute torts. They may be acting altogether outside the course of their employment "on a frolic of their own." They may also have such independent discretion as not to be servants in the exercise of their functions, *e.g.* the visiting physicians of a hospital:[3] *Evans* v. *Liverpool Corporation*, [1906] 1 K.B. 160. They may be acting under the control of a central authority, even though appointed by a local authority, or may be performing an independent public duty cast upon them by the law after their appointment: *Stanbury* v. *Exeter Corporation*, [1905] 2 K.B. 838, where a local authority was held not liable for the negligence of an inspector, who, though appointed by it, was acting at the time under an order of the Board of Agriculture; *Fisher* v. *Oldham Corporation*, [1930] 2 K. B. 364, where a local authority was held

[1] For fuller treatment of this topic, see Dicey, *op. cit.*, Appendix, Section I., pp. 539–41

[2] See Winfield, *Text-book of the Law of Tort* (Sweet & Maxwell), 2nd ed., p. 118, and note (*f*), *ibid.*

[3] But see as to administrative duties *Lindsey County Council* v. *Marshall*, [1937] A.C. 97.

not liable for a mistake made by a constable in arresting the wrong person, though the constable was appointed by the watch committee which paid him and could dismiss him. Powers of arrest are conferred directly upon a constable by statute and in exercising them he is not the servant of the local police authority.[1]

Statutory Justification.

Where Parliament has expressly authorised something to be done, the doing of it cannot be wrongful. Compensation for resulting damage is usually provided by Parliament. Certain presumptions are, however, observed in the construction of statutes. In particular it is assumed that, when authority is given to a public body to perform some administrative act, there is no intention to interfere with private rights, unless the power is expressed in such a way as to justify such interference. A case which illustrates this is *Metropolitan Asylums Board* v. *Hill* (1881), 6 App. Cas. 193 ; K. & L. 154. Statutory powers which authorised the construction of a smallpox hospital in Hampstead were held not to have sanctioned the erection of the building in such a way as to constitute a nuisance at common law in the absence of express words or necessary implication in the statute. At pp. 212–13 Lord Watson said :

> " I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorised a certain use of a specific building in a specified position, which cannot be used without occasioning nuisance. . . . Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose."

If, however, the performance of a statutory duty is imperative and inevitably involves injury to private rights, or if express powers are given to do something in a particular way which must involve injury, *e.g.* to construct a building upon a particular site for a particular purpose, there is no remedy unless the statute makes provision for compensation: *Hammersmith Railway Co.* v. *Brand* (1869), L.R. 4 H.L. 171. We have, however, already seen that the negligent performance of a statutory duty or exercise of statutory powers is tortious ;[2] and where the exercise of a statutory power necessarily involves injury, care must none the less be taken to avoid aggravating the injury by negligent execution: *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, at pp. 455–6. Where a statutory power can be exercised in a manner either hurtful to an individual or in a manner innocuous to an individual " that

[1] P. 165, *ante*.
[2] *Mersey Docks and Harbour Board* v. *Gibbs*, p. 258, *ante*.

man or body will be held to be guilty of negligence if he chooses, or they choose, the former mode of exercising his power or their power, and not the latter, both being available to him or them": *Lagan Navigation Co.* v. *Lambeg Bleaching, Dyeing and Finishing Co.*, [1927] A.C. 226, *per* Lord Atkin at p. 243.

Statutory Remedies.

The omission to perform a statutory duty sometimes gives rise to tortious liability. Hitherto we have been considering negligent and other wrongful acts which render the doer liable at common law to an action for damages. The mere omission to perform a duty imposed by a statute does not always give rise to such liability. Sometimes a statutory duty coincides with a common law duty and then the common law right to claim damages for its breach remains, unless it is taken away by the statute. Thus a workman injured through his employer's negligence may elect either to claim compensation under the Workmen's Compensation Act, 1925, or to sue for damages at common law. Frequently, however, a statute creates an entirely new duty and usually imposes a penalty for failure to perform it. In such event it must be discovered from the interpretation of the statute whether the remedy for breach of duty is limited to the penalty provided by the statute or whether there is also an action in tort available to a person injured by the breach.[1] *Prima facie* a person injured by a breach of a statutory duty can sue unless it can be established by considering the statute as a whole that no such right was intended to be given;[2] usually there is no such right where the duty is that of a public authority.[3] "The English doctrine that public authorities are not in general liable for non-feasance, but are for mis-feasance, expresses darkly and unscientifically a great part of the American rule that purely governmental powers are not sources of civil liability."[4] In the case of the common law duty to repair a highway, which was transferred by statute from the inhabitants of a parish to highway authorities, an action lies against a highway authority for mis-feasance[5] (*e.g.* the imperfect filling of a trench) but not for non-feasance (mere failure to repair);[6] but there is liability for breach of a statutory duty, *e.g.* to repair a bridge which is not part of the highway;[7] and for failure to remove a defective tram-track

[1] For rules assisting in interpretation, see Winfield, *op. cit.*, pp. 170–75.
[2] *Monk* v. *Warbey*, [1935] 1 K.B. 75.
[3] E.g. *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex.D. 441, no liability where plaintiff's house was burned down because of failure to maintain pressure in water pipes; *Saunders* v. *Holborn District Board*, [1895] 1 Q.B. 64, no liability where damage caused by failure to clear street refuse.
[4] "Liability for Acts of Public Servants," by Sir W. Harrison Moore, 23 *L.Q.R.*, p. 12.
[5] *Shoreditch (Mayor of)* v. *Bull* (1904), 90 L.T. 210.
[6] *Cowley* v. *Newmarket Local Board*, [1892] A.C. 345.
[7] *Guilfoyle* v. *Port of London Authority*, [1932] 1 K.B. 336.

from a highway.[1] A breach of duty is usually punishable on indictment as a misdemeanour.[2] An indictment lies in respect of a public nuisance where the breach constitutes a nuisance to the public generally. Such an indictment can be brought for failure to repair a highway.

Public Authorities Protection Act, 1893.

The Public Authorities Protection Act, 1893, as amended by the Limitation Act, 1939, s. 21 (1), protects the acts of public servants from challenge in the courts after a short lapse of time. No action may be brought against any person (which term includes public authorities and servants of the Crown) for any act done in pursuance or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year [3] from the date on which the cause of action accrued. Further, in the event of the defendant being successful there are penal provisions as to costs which render litigation with a public authority hazardous and expensive. The Act does not make an unlawful act lawful since, until the period of limitation operates, the jurisdiction of the courts is not ousted.

Scope of Protection.

It is probable that the Act only applies where the act complained of is done with an honest motive.[4] Negligence in the performance of (or the breach of) a special contract with an individual is not within the Act, even though the contract is made in pursuance of a statutory power: *Bradford Corporation* v. *Myers*, [1916] 1 A.C. 242, where the corporation sold coke to a consumer and their carter did damage in the course of delivery to the customer's property. It is to be noted that the corporation was under no duty to sell coke, the power to do so being permissive. The Act does apply to actions for breach of a contract which a public authority is under a duty to make: *Compton* v. *West Ham Borough Council*, [1939] Ch. 771, an action for arrears of salary by an official. It does not apply to actions for the recovery of land since it is the duty of all and not merely of public bodies to respect the property rights of others.[5] The period of limitation does not begin to run while the plaintiff is under a legal disability (infancy, unsoundness of mind or a convict for whom no administrator has been appointed). A cause of action accrues at the earliest time when an action can be brought,[6] but where the act, neglect or default is a continuing one, no cause of action is deemed to have accrued

[1] *Simon* v. *Islington Borough Council*, [1943] K.B. 188.
[2] *The King* v. *Pinney* (1832), 5 C. & P. 245; K. & L. 363.
[3] For criminal proceedings the period of limitation is six months.
[4] *Scammell* v. *Hurley*, [1929] 1 K.B. 419, *per* Scrutton, L.J., at p. 427
[5] *Cross* v. *Rix* (1912), 11 L.G.R. 151, at p. 155.
[6] In the absence of concealed fraud.

until the default has ceased. Thus a plaintiff injured by the negligence of a highway authority must bring an action within twelve months of the date of the injury, even though the effects of the injury continue for more than twelve months and may become more injurious after that period.[1] Where, however, a tort is actionable only on proof of special damage, time runs from the moment when the damage occurs. The Act does not apply to proceedings for certiorari, mandamus or prohibition, nor to proceedings by petition of right, nor to any proceedings by a government department against any local authority or officer of a local authority. It applies to actions for threatened injury.[2] Finally a public authority cannot plead the Act, unless it is acting as such. Thus when the responsibility for maintenance of a trunk road was transferred to the Minister of War Transport who employed the former highway authority to execute certain works as his agent, an action against the authority was held not to be within the Act, as it was acting, not as a public authority, but merely as a contractor employed by the Ministry: *Drake* v. *Bedfordshire County Council*, [1944] K.B. 627.

Policy of Act.

The policy of the Act, which replaced a number of statutes containing varying periods of limitation for actions against various public bodies, has been judicially explained in the following terms: " By the limitation which it imposes it prevents belated and in many cases unfounded actions. In this way it . . . prevents one generation of ratepayers from being saddled with the obligations of another, and secures steadiness in municipal accounting": *Bradford Corporation* v. *Myers*, *ante*, *per* Lord Shaw, at p. 260. Professor Winfield has commented that the policy is sound as regards administrative acts, but that the great majority of cases in which the act has been pleaded have been concerned with the negligence of municipal tram-drivers or medical officers and the like, and that there seems no valid argument for giving them a special privilege merely because they are remunerated out of public funds.[3] A public authority enjoys the protection of the Act, not because the act complained of is necessarily *intra vires*, but because it is done in the direct execution of a statutory duty or in discharge of a public duty or in the exercise of an authority given for public purposes.

[1] *Carey* v. *Metropolitan Borough of Bermondsey* (1903), 20 T.L.R. 2; *Freeborn* v. *Leeming*, [1926] 1 K.B. 160. The period was six months until it was increased to twelve months by Limitation Act, 1939, s. 21.

[2] *Graigola Merthyr Co.* v. *Swansea Corporation*, [1929] A.C. 344.

[3] Winfield, *op. cit.*, p. 708.

CHAPTER 3.

PROCEEDINGS BY AND AGAINST THE CROWN.

Fundamental Rules.

THERE are two main rules which govern the complicated law relating to the liability of the Crown and its servants: (1) the rule of substantive law that the King can do no wrong; (2) the procedural rule that the King cannot be sued in his own courts—a rule derived from the feudal days when a lord could not be sued in his own court.

What is the Crown?

It is necessary to consider separately (*a*) contractual and (*b*) tortious liability, but first it must be emphasised that the term "Crown" includes all the departments of the Central Government, and, unless a statute expressly provides otherwise,[1] a Minister of the Crown retains the immunity of the Crown when as agent of the Crown he performs duties or exercises powers conferred upon him by statute in his own name. The shield of the Crown only covers what may be described as the general government of the country.[2] Thus the immunity of the Crown is generally not enjoyed by independent statutory authorities which are not presided over by a Minister of the Crown,[3] *e.g.* the Central Electricity Board, the British Broadcasting Corporation and the agricultural marketing boards. In some cases, however, these bodies act on behalf of the Crown and enjoy the status of incorporation and also the immunity of a government department, *e.g.* the Assistance Board and the Livestock Commission. It is necessary to examine in each case the particular Act of Parliament which establishes the body concerned.

Contractual Liability: Petition of Right.

No action can be brought against the Crown. It is, however, essential that the subject should be able to obtain his rights under a contract made with a government department. The remedy is a petition of right, which was originally a remedy available only for the recovery of property, but is now available to enforce any contractual obligation. The practice is governed by the Petitions of Right Act, 1860.[4] A petition of right lies in respect of any claim arising out of rightful acts by which the Crown can be bound, but not in respect of claims arising out of wrongful acts. It lies for the recovery of real property, and probably also for the recovery of a chattel,[5] to recover damages for a breach of contract: *Thomas* v. *The Queen* (1874), L.R. 10 Q.B. 31; K. & L. 231, and to recover

[1] P. 266, *post*.

[2] "Liability for Acts of Public Servants," by Sir W. Harrison Moore, 23 *L.Q.R.*, p. 12. *Mersey Docks Trustees* v. *Cameron* (1861), 11 H.L.C. 443, at p. 508.

[3] Part IV., Chap. 10, *ante*.

[4] For text, see K. & L. 229.

[5] Winfield, *op. cit.*, p. 94.

compensation under a statute: *Attorney-General* v. *De Keyser's Royal Hotel*, [1920] A.C. 508. It is a condition precedent to the hearing of a petition by the court that it should be endorsed with the words *fiat justitia* by the Crown on the advice of the Home Secretary, who takes the opinion of the Attorney-General. There is no appeal against the refusal of the *fiat*, which is always granted unless the application is frivolous or plainly discloses no cause of action. A judgment in favour of a suppliant on a petition of right takes the form of a declaration of the rights to which the suppliant is entitled and, being always observed by the Crown, is as effective as a judgment in an ordinary action.

Crown Contracts.

It is not every contract entered into by the Crown which gives a right to redress for its breach. In all contracts made by the Crown there is an implied condition that the obligation is dependent upon the supply of funds by Parliament: *Churchward* v. *The Queen* (1865), L.R. 1 Q.B. 173. It is a rule of law that the Crown cannot by contract hamper its future executive action: *Rederiaktiebolaget Amphitrite* v. *The King*, [1921] 3 K.B. 500; K. & L. 242, where the court held unenforceable an undertaking by the Government promising freedom from detention to a Swedish ship trading with Great Britain during the First World War. Attempts have been made from time to time to sue those who have made contracts on behalf of the Crown, but in accordance with the general rule of law an agent is not liable upon a contract made upon his employer's behalf: *Macbeath* v. *Haldimand* (1786), 1 T.R. 172.

Service under the Crown.

It is because of the general rule that the Crown cannot hamper its future action that no servant of the Crown can claim damages for wrongful dismissal. The Crown cannot hamper its freedom to dismiss its servants at will in the public interest, and the relationship between the Crown and its servants is not contractual. In the absence of some statutory provision to the contrary [1] civil servants may be dismissed at pleasure: *Dunn* v. *The Queen*, [1896] 1 Q.B. 116; K. & L. 241, where Lord Herschell said:

> " Such employment being for the good of the public, it is essential for the public good that it should be capable of being determined at the pleasure of the Crown, except in certain exceptional cases where it has been deemed to be more for the public good that some restriction should be imposed on the power to dismiss its servants." [2]

[1] *E.g.* the statutory provision that judges hold office during good behaviour, Part V., p. 214, *ante*; see also *Gould* v. *Stuart*, [1896] A.C. 575, where the New South Wales Civil Service Act, 1884, was held to override the general rule.

[2] Having failed in his petition of right, Dunn sued the servant of the Crown who had engaged him, for damages for breach of warranty of authority. It was held that no action lies against a Crown servant for breach of warranty of authority, but the decision could be supported on the narrower ground that Dunn must be deemed to have known that the officer who had engaged him had no power in law to engage him for a fixed period: *Dunn* v. *MacDonald*, [1897] 1 Q.B. 401, discussed in K. & L., p. 224.

Security of Tenure.

The security of the Civil Service depends upon convention rather than law.[1] The agreements reached between the Treasury and representatives of the staff of government departments in joint councils (Whitley Councils) and afterwards confirmed by the Treasury do not give rise to contractual rights: *Rodwell* v. *Thomas* (1944), 60 T.L.R. 431. No remedy exists where an officer appointed under statutory authority loses his office through its premature termination by Act of Parliament without compensation, since the agreement has become impossible of performance: *Reilly* v. *The King*, [1934] A.C. 176. Members of the armed forces (and possibly civil servants) [2] cannot sue for arrears of pay, for no engagement between the Crown and members of the armed forces can be enforced by a court of law: *Leaman* v. *The King*, [1920] 3 K.B. 663; *Kynaston* v. *Attorney-General* (1933), 49 T.L.R. 300.

Tortious Liability.

The rule that " the King can do no wrong " makes it impossible to sue the Crown either in respect of wrongs expressly authorised by the Crown or in respect of wrongs committed by servants of the Crown in the course of their employment: *Viscount Canterbury* v. *Attorney-General* (1842), 1 Ph. 306; K. & L. 244. The actual wrongdoer, who is usually a subordinate official, can alone be sued. A superior official is not responsible for wrongs committed by his subordinates unless he has expressly authorised them, for all the servants of the Crown are fellow-servants of the Crown and not of one another: *Raleigh* v. *Goschen*, [1898] 1 Ch. 73; K. & L. 250; *Bainbridge* v. *Postmaster-General*, [1906] 1 K.B. 178; K. & L. 252. The actual wrongdoer cannot, as has been seen, plead the orders of the Crown as a defence. In practice the Treasury Solicitor usually defends an action against a subordinate official and the Treasury, as a matter of grace, pays damages if he is found liable. In 1942 the Lord Chancellor appointed an independent person to certify (if the plaintiff so desires) whether a subordinate was acting in the course of his employment. In mitigation of the immunity of the Crown from tortious liability a declaratory judgment may be obtained in an action against the Attorney-General declaring illegal a contemplated action of the Crown: *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410; K. & L. 265; but this procedure cannot be used to prejudge an issue which might have to be adjudicated upon in a petition of right and, therefore, cannot be used to obtain a declaration as to compensation payable for breach of contract or detention of property by the Crown: *Bombay and Persia Steam Navigation Co.* v. *Maclay*, [1920] 3 K.B. 402, at p. 408.

There must be distinguished from the rule that the Crown can

[1] Part II., Chap. 4, *ante*.

[2] *Lucas* v. *Lucas and High Commissioner for India*, [1943] P. 68; but see "A Civil Servant and his Pay," by D. W. Logan, 61 *L.Q.R.* 240.

do no wrong the rule that Acts of Parliament do not bind the Crown, unless the particular statute so enacts either by express words or by necessary implication: *Food Controller* v. *Cork*, [1923] A.C. 647. It is by the operation of this rule that Crown property is exempt from local rates and income tax. Here, again, the term "the Crown" includes all those departments which can be regarded as exercising functions which emanate from the Crown or form part of the general government of the country, but the mere fact that premises are used for public purposes does not result in exemption. Thus exemption from income tax was accorded in respect of a building used for Assizes and as a county police station: *Coomber* v. *Justices of Berks* (1883), 9 App. Cas. 61; but exemption from rates was not accorded to the outfall works of a county council acting as sewerage authority: *L.C.C.* v. *Erith* (*Churchwardens*) *and Dartford Union Assessment Committee*, [1893] A.C. 562. Where a statute does not apply to the Crown or its servants acting in the course of duty, there is no liability on the part of the individual servant for a breach of the statute, for he has committed no offence: *Cooper* v. *Hawkins*, [1904] 2 K.B. 164, where it was held that a local regulation fixing a speed limit did not apply to the driver of a War Office lorry, as the statute which authorised the making of the regulation neither expressly nor impliedly authorised the making of regulations to bind the Crown.

Government Departments.

It has been stated that government departments enjoy the immunity of the Crown unless a statute expressly provides otherwise.[1] Various statutes have attempted to simplify proceedings against particular departments, but the varying methods adopted and the complications arising have caused great perplexity and it is doubtful whether the attempts to assist the subject have not increased his troubles.[2] The following propositions are thought to represent the present law.

1. Express words are required to render a government department liable for torts. It is not sufficient for the Act to state that the Minister may sue or be sued: *Minister of Supply* v. *British Thomson Houston Co.*, [1943] K.B. 478. The Ministry of Transport Act, 1919, s. 26, expressly renders the Minister of Transport liable for both contracts and torts arising out of his department.

2. Where a statute provides that a Minister may "sue or be sued" or uses similar words, *e.g.* "may institute or defend an

[1] P. 263, *ante*.

[2] The student who wishes to appreciate some of the complications of the subject should study *Marshall Shipping Co.* v. *Board of Trade*, [1923] 2 K.B. 345; *Rowland* v. *Air Council* (1923), 39 T.L.R. 228 and 455 (C. of A.); *Rowland and Mackenzie-Kennedy* v. *Air Council* (1925), 41 T.L.R. 545; *Mackenzie-Kennedy* v. *Air Council* (1927), 96 L.J.Ch. 470 and at p. 477; and [1927] 2 K.B. 517; *Gilleghan* v. *Minister of Health*, [1932] 1 Ch. 86.

action," arising out of contracts which the statute authorises him to enter into, the Minister is liable to be sued on contracts made by him or on his behalf: *Minister of Supply* v. *British Thomson Houston Co., ante.*

3. The incorporation of a department *may* render it liable to be sued on its contracts: *Graham* v. *Commissioners of Public Works*, [1901] 2 K.B. 781.

4. A corporation is a legal person and, like an individual servant of the Crown, cannot, unless a statute expressly so provides, be sued in a representative capacity so as to render the Crown liable for a tort; but, like any other person, it can be sued for tortious acts which it has expressly authorised: [1] *Mackenzie-Kennedy* v. *Air Council*, [1927] 2 K.B. 517, *per* Atkin, L.J.

5. When a judgment is given against a Minister made liable by statute for the contracts or torts of his department, he is not personally liable to satisfy the judgment " because it is shown that the action lies against his office and not the individual, as it is provided that the action shall not be affected by any change of the person for the time being holding the office. It must be presumed that the Minister will satisfy the judgment out of monies provided by Parliament for his office ": *Minister of Supply* v. *British Thomson Houston Co., ante, per* Goddard, L.J., at p. 492.

Procedural Advantages.

In addition to its immunities from liability the Crown enjoys procedural advantages in litigation with subjects. There is not available against the Crown the process known as discovery, by which a litigant can be compelled to disclose the nature of the relevant documents in his possession.[2] In practice all proper disclosure and production of documents would be given, unless disclosure was contrary to the public interest.

It is open to the Crown to proceed against a subject, not by ordinary action, but by the archaic and unfamiliar forms of Latin or English informations.

Proposals for Reform.

The peculiar position of the Crown in litigation was described by the Committee on Ministers' Powers as giving rise to a " lacuna in the rule of law." The difficulty facing a subject in getting justice from a government department has been judicially described as

[1] P. 258, *ante*, for torts not expressly authorised and *ultra vires* the corporation.

[2] This rule must not be confused with another rule which is applicable not only in litigation to which the Crown is a party, viz. that a court of law should uphold the objection of the ministerial or permanent head of a public department called upon to produce documents, if the department states that on grounds of public policy they ought not to be produced. Objection may be taken on the ground that the particular document should not in the public interest be disclosed, or on the ground that it is one of a class which must be treated as confidential, *e.g.* in order to guarantee freedom and candour of communication on public matters in confidential reports: *Duncan* v. *Cammell Laird & Co. Ltd.*, [1942] A.C. 624.

discreditable to the English Constitution.[1] The whole question was in 1921 referred to the Crown Proceedings Committee, which reported in 1927 in the form of a draft Bill.[2] Under this Bill it was recommended (*a*) that the Crown should be liable in tort; (*b*) that the Crown itself should enjoy the protection of the Public Authorities Protection Act, 1893, in the same way that servants of the Crown are protected under the present law; (*c*) that petitions of right should be abolished and that proceedings by and against the Crown should be assimilated, as far as is possible, to ordinary civil proceedings; (*d*) that costs should be awarded to and against the Crown; (*e*) that discovery should with proper safeguards be available against the Crown. The Report has met with the support of lawyers and was endorsed by the Committee on Ministers' Powers. Its main recommendations have not, however, yet become law, though by the Administration of Justice (Miscellaneous Provisions) Act, 1933, it has been enacted (*a*) that proceedings by the Crown (though not proceedings against the Crown) may be instituted in the County Court; (*b*) that debts due to the Crown may, without prejudice to procedure by means of information, be recovered by proceedings instituted by an ordinary writ of summons; (*c*) that costs may be awarded to or against the Crown in any civil proceedings to which the Crown is a party. The Limitation Act, 1939, made the ordinary periods of limitation for bringing an action applicable to proceedings by and against the Crown.[3] The opposition to the adoption of the Report as a whole has so far been stubborn. Successive Law Officers have stated that the Government cannot accept the principle that the Crown should be made liable in tort. The principal argument advanced against this reform is that juries would award excessive damages to successful plaintiffs, being influenced by the knowledge that the capacity of the Crown to pay was limitless.

Scotland.

In Scotland the Lord Advocate is the proper person to sue or to be sued on behalf of the Crown or a department of government, but certain departments may sue and be sued by name: Crown Suits (Scotland) Act, 1857. Expenses (*i.e. anglice* costs) are on the same footing as for ordinary parties and therefore may be awarded against the Lord Advocate. The special procedure by petition of right has no operation in Scots law; the ordinary forms of action (for payment or for declarator) are used against the Lord Advocate. It was decided as early as 1534 that suits be " only in the Court of Session "; and see *Somerville* v. *Lord Advocate* (1893), 20 R. 1050.

[1] *Mackenzie-Kennedy* v. *Air Council* (1927), 96 L.J.Ch. 470, at p. 479.

[2] *Crown Proceedings Committee Report* (Cmd. 2842), 1927.

[3] Previously there was no period of limitation for actions by the Crown, except that for the recovery of land the period (now 30 years) was 60 years, instead of the ordinary period of 12 years.

With regard to substantive rights, as in English law, an action for reparation (tort) is incompetent because the King is not liable for the wrongs of his servants: *Macgregor* v. *Lord Advocate*, [1921] S.C. 847. Again, the English rule that the Crown is not bound by statute unless by express words or necessary implication applies. But the Crown is liable in contract, subject to the following exceptions:

(1) Contracts between the Crown and its servants are, as in England, not enforceable by the servants.

(2) Generally the Crown is not bound by a contract which hampers its future executive action: see *Amphitrite* v. *The King* (*ante*).

(3) If Parliament does not provide the funds, the Crown cannot fulfil its part of the contract and is not liable for breach of contract: *Churchward* v. *The Queen* (*ante*).

Thus the differences are mainly procedural.[1]

[1] See generally W. I. R. Fraser, *Outline of Constitutional Law* (Hodge), pp. 114 *et seq.*

CHAPTER 4.

JUDICIAL CONTROL OF POWERS.

IT has been shown that the main external control of the exercise of administrative powers is that of Parliament, but that the courts also exercise control when a power is exceeded or abused.[1] It is the purpose of this Chapter to examine the principles and methods of judicial control of administrative powers. The arguments in favour of or against delegated legislation and administrative justice will be discussed in Chapters 5 and 6 respectively. This Chapter will be confined to a statement of the law.

Ultra Vires Rule.

When a power is exceeded, any acts done in excess of the power will be invalid as being *ultra vires*. The *ultra vires* doctrine cannot be used to question the validity of an Act of Parliament; but it is effective to control those who exceed the administrative discretion which an Act has given. The simplest example of the application of the *ultra vires* rule is where an act is done in excess of a power, or where jurisdiction to adjudicate upon a dispute is plainly exceeded.

To illustrate the application of the rule by three examples:

(1) A public authority upon which a power is conferred exceeds that power by doing an act which interferes with existing personal or proprietary rights and thus would give rise to a right of action or a prosecution, if done by a private person: *Attorney-General* v. *Fulham Corporation*, [1921] 1 Ch. 440. The borough council of Fulham arranged to benefit the housewives of the borough by installing a municipal laundry with the latest contrivances worked by corporation officials. Under the Baths and Wash-houses Acts, 1846 and 1847, the council had power to establish a wash-house, where people could wash their own clothes. A ratepayer tested the question whether the new laundry was *intra vires* this power and sought by an injunction to restrain the corporation from conducting the laundry as a business. It was held that the statutory power was confined to the establishment of a wash-house and that it was *ultra vires* for the Fulham Corporation to wash the clothes itself, that is, by its servants. Thus were the women of Fulham deprived of the benefit of an up-to-date municipal laundry.

(2) An authority may be given by Parliament the power to legislate. By the Trade Boards Act, 1909, s. 11 (1), powers were given to make regulations with respect to the constitution of trade boards

[1] P. 253, *ante*.

consisting of members representing employers and members representing workers in equal proportions in addition to appointed members. If regulations had been made establishing a trade board which did not contain an equal proportion of members representing employers and workers, these regulations would have been *ultra vires*.[1]

(3) Under the Housing Act, 1925, the Minister of Health was empowered to confirm improvement schemes submitted by local authorities in accordance with the provisions of the Act. A scheme was submitted for confirmation which was not within the Act in that it left the local authority free to sell or lease land compulsorily acquired without restricting the use to which the land should be put. It was held that the Minister's jurisdiction was confined to confirming schemes which were within the Act: *The King* v. *Minister of Health, ex parte Davis*, [1929] 1 K.B. 619. The scheme was *ultra vires* and, had he confirmed it, the Minister would have acted in excess of his jurisdiction.

Abuse of Powers.

The courts will intervene not only to prevent powers being exceeded, but also to prevent their being abused (*détournement de pouvoir*). Control of the improper exercise of powers may also be regarded as an application of the *ultra vires* doctrine. The exercise of a discretion without taking into account all relevant considerations is equivalent to a failure to exercise it. The exercise of a power for an improper purpose is not an exercise of a power conferred for purposes defined in the statute which confers it. Acts which are *prima facie* lawful may be invalidated, if they are done for a wrong purpose or by a wrong procedure. The exercise of a quasi-judicial power in abuse of the rules of natural justice is tantamount to a failure to exercise it at all. It must, however, again be stressed that where a discretion is committed to an administrator, whether it is of a quasi-judicial character or not, no *appeal* against his decision lies to the courts. Provided that the discretion is exercised legitimately, the courts cannot substitute their discretion for his.[2] The only appeal is to higher administrative authority or by raising the matter in Parliament.

Improper Purposes.

We have already seen,[3] that a discretion may not be exercised upon irrelevant grounds. Any exercise of a power for an improper purpose is invalid as not being done *bona fide*. A distinction must be drawn between purpose and motive. Where an exercise of a power fulfils the purposes for which the power was given, it matters not that those exercising it were influenced by an extraneous motive. The distinction is best illustrated by

[1] See now Wages Councils Act, 1945.
[2] P. 253, *ante*.
[3] *The Queen* v. *Boteler*, p. 254, *ante*.

reference to decided cases. The Municipal Council of Sydney was empowered to acquire land compulsorily for the purpose of extending streets or improving the city. The council purporting to exercise this power acquired land, not for the purpose of an extension or improvement, but with the object of taking advantage of an anticipated increment of value. The acquisition of the land was an invalid exercise of the power: *Municipal Council of Sydney* v. *Campbell*, [1925] A.C. 338. In another case, the Westminster Corporation was empowered to construct public conveniences. Underground conveniences were designed so that the subway leading to them provided a means of crossing a busy street. It was sought to restrain the Corporation from proceeding with the work on the ground that the real object was the provision of a crossing and not of public conveniences. The court refused to intervene. "It is not enough to show that the Corporation contemplated that the public might use the subway as a means of crossing the street. In order to make out a case of bad faith, it must be shown that the Corporation constructed the subway as a means of crossing the street under colour and pretence of providing public conveniences not really wanted": *Westminster Corporation* v. *London and North Western Railway Co.*, [1905] A.C. 426, *per* Lord Macnaghten, at p. 432. Similarly the court refused to intervene when the Brighton Corporation improved a road which needed improving and which it had power to improve for the public benefit, although the motive of the improvement was largely to induce an automobile club to hold races upon it: *The King* v. *Brighton Corporation, ex parte Shoesmith* (1907), 96 L.T. 762.

Excessive Expenditure.

Excessive expenditure upon a lawful object may be illegal: *Roberts* v. *Hopwood*, [1925] A.C. 578, where the court held invalid a payment of wages by the Poplar Borough Council which fixed an arbitrary sum for wages without regard to existing labour conditions. "It does not, however, follow that expenditure may properly be disallowed wherever the reasons for it are ill-advised, stupid or even (it may be) dishonest. The expenditure might yet be right in itself in which case it would not be disallowed": *In re Decision of Walker*, [1944] K.B. 644, *per* Du Parcq, L.J., at p. 650. Just as irrelevant considerations must not be taken into account (*The Queen* v. *Boteler*, p. 254, *ante*), so relevant considerations must not be overlooked (*Roberts* v. *Hopwood*, *ante*). Similarly a decision will be quashed where the adjudicators have in error not addressed themselves to the real point to be decided: *The King* v. *Board of Education*, [1910] 2 K.B. 165 (affirmed *sub nomine Board of Education* v. *Rice*, [1911] A.C. 179). So, too, the courts intervened where licensing justices of a borough, who were empowered to fix an earlier closing hour in particular localities, made a general rule for earlier

closing hours throughout the borough without reference to the needs of the particular localities concerned.[1]

Control of Quasi-Judicial Powers.

It has already been shown that an excess of jurisdiction may be restrained by the courts, and that a power to confirm a valid scheme may not be exercised by confirming an invalid one. Other examples of excess of jurisdiction in the exercise of quasi-judicial powers are:

(i) A borough council made an order for the compulsory acquisition of land under section 1 of the Housing Act, 1930, which authorised the acquisition of land for the purpose of clearance. Before the order had been confirmed the owner had demolished the houses on the land. The council none the less applied for confirmation. It was held that the order could only be confirmed for the purpose of clearance which was not the purpose for which its confirmation was sought: *Marriott* v. *Minister of Health* (1935), 105 L.J.K.B. 125 (affirmed C.A., [1937] 1 K.B. 128).

(ii) The Minister of Transport is empowered to hear appeals from traffic commissioners in respect of the grant of road service licences. While upholding a decision of the commissioners to grant a licence, the Minister decided that the licence should be revoked at such time as other provision was made for road services on the road in question. It was held that the Minister in laying down conditions for the future was exercising an original jurisdiction which had not been conferred upon him, instead of an appellate jurisdiction, and that his order was, therefore, invalid: *The King* v. *Minister of Transport, ex parte Upminster Services*, [1934] 1 K.B. 277.

Procedure of Administrative Tribunals.

The most frequent cause for judicial interference with the exercise of quasi-judicial powers is a disregard of what are known as the rules of natural justice. These rules do not require that the proceedings of an administrative tribunal must be conducted as in a court of law or in accordance with the strict rules of evidence, but they seek to ensure that justice shall not only be done, but also seem to be done. The leading case on this topic is *Local Government Board* v. *Arlidge*, [1915] A.C. 120; K. & L. 199.

> The Hampstead Borough Council had made a closing order in respect of a house which appeared unfit for human habitation. The owner appealed to the Local Government Board in the manner prescribed by the Public Health Act, 1875,[2] under which the Board might make such order in the matter as might seem equitable, and the order so made would be binding and conclusive on all parties. After a public local enquiry the Board dismissed the appeal. Arlidge applied to the courts to declare the decision to be invalid, mainly on

[1] *Macbeth* v. *Ashley* (1874), L.R. 2 H.L.Sc. 352, cited by Lord Halsbury, L.C., in *Sharp* v. *Wakefield*, [1891] A.C. 173.

[2] For present procedure of appeal to the County Court, see Housing Act, 1936, s. 15.

the grounds that the order in which it was embodied did not disclose which of the officials of the Board actually decided the appeal; that he, the plaintiff, did not have an opportunity of being heard orally by that official; that he was not permitted to see the report of the inspector who conducted the public enquiry on behalf of the Board. It was held by the House of Lords, reversing the Court of Appeal, that Arlidge could not object to the order on these grounds, since Parliament having entrusted judicial duties to an executive body must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which was its own and was necessary if it was to be capable of doing its work efficiently. Furthermore, Parliament had empowered the Board to frame rules to regulate its own procedure. So long as the officials dealt with the question referred to them without bias, and gave the parties an opportunity of presenting the case in adequate form, the Board could follow its own particular methods of procedure which were necessary, if it were to do its work efficiently, even though that procedure did not follow meticulously that of a court of law.

Similarly in *Board of Education* v. *Rice*, [1911] A.C. 179, Lord Loreburn laid it down that in disposing of an appeal the Board of Education was bound to act in good faith and to listen fairly to both sides, since that was a duty which lay on everyone who decided anything. The Board was not, however, bound to follow the procedure of a trial. It could obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view.

Rules of Natural Justice.

The rules of natural justice must, however, be observed. A man must not be judge in his own cause. Both sides must be heard (*audi alteram partem*). These rules do not admit of precise definition. They have been described by Lord Selborne in *Spackman* v. *Commissioners of Public Works* (1885), 10 App. Cas. 229.

> " No doubt in the absence of special provisions as to how the person who is to decide is to proceed the law will imply no more than that the substantial requirements of justice shall not be violated. He (the administrator) is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard and stating their case and their view. He must give notice that he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice."

Again, Swift, J., has explained the duty of a person holding a public enquiry,[1] and the statement applies to any " person or body

[1] *Marriott* v. *Minister of Health* (1935), 105 L.J.K.B. 125 (affirmed C.A., [1937] 1 K.B. 128).

charged with the duty of deciding" [1]; he must take care that the views of both the contending parties and the contentions they submit and the evidence they proffer are given proper weight; that nothing is done against the instinct which every citizen possesses to offend against which is said to be contrary to natural justice. The courts will not intervene merely because an irregularity has occurred (*e.g.* the asking of an improper question in examining a witness), but only if there is a departure from natural justice which goes to the root of the matter and renders the enquiry a nullity.[2]

No man a judge in his own cause.

It is an elementary principle that bias must be eliminated from influencing judicial decision. Without the consent of all parties no judge can adjudicate an issue in which he has any personal or proprietary interest at stake. The judge who is a shareholder in a company which appears before him as litigant must decline to hear the case, save by consent: *Dimes* v. *Grand Junction Canal* (*Proprietors of*) (1852), 3 H.L.C. 759. An extreme instance is furnished by *The King* v. *Sussex Justices, ex parte McCarthy*, [1924] 1 K.B. 256, which shows that the possibility of a suspicion of bias, even where none actually influenced the decision, is a ground for allowing an appeal.

> The acting clerk to the justices was a member of a firm of solicitors who were to represent the plaintiff in civil proceedings pending as a result of a collision in connection with which the applicant was summoned for a motoring offence. The acting clerk did not in fact advise the justices in the decision at which they arrived to convict the applicant, but retired with the bench. It was held that, as the clerk's firm was connected with the case in the civil action, he ought not to advise the justices in the criminal matter and therefore could not, had he been required to do so, properly have discharged his duties as clerk.
>
> The conviction was accordingly quashed, despite the fact that the clerk had actually taken no part in the decision to convict, the bench not asking for his opinion or advice.

On the other hand, in *The Queen* v. *Rand* (1866), L.R. 1 Q.B. 230; K. & L. 193, the Court of Queen's Bench refused to set aside a certificate given by justices in favour of the Bradford Corporation merely on the ground that two of the justices were trustees of societies which had invested funds in bonds of the Corporation. There will be discussed in Chapter 6 the question how far the rule that a man should not be judge in his own cause should prevent the settlement of disputes being entrusted to administrators.

[1] Lord Wright regarded these words as the best description of those bound to follow the rules of natural justice: *General Medical Council* v. *Spackman*, [1943] A.C. 627.

[2] In *General Medical Council* v. *Spackman*, Lord Atkin suggested that these requirements of natural justice might be more strict, *e.g.* when the name of a professional man was being removed from the register, than, *e.g.* where a school was being closed.

Audi alteram partem.

An equally elementary principle of justice is that no party ought to have his case decided without being afforded an opportunity of hearing the case which he has to meet as well as stating his own case. "Even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam,' says God, 'where art thou? Hast thou not eaten of the tree that thou shouldst not eat?'"[1] In *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180; K. & L. 194, the court quashed a demolition order, justifiable in itself, which was made by the Board without giving notice to the owner of the property or affording him an opportunity of being heard. There is, however, no obligation, unless a statute so provides,[2] that a hearing should be oral: *Local Government Board* v. *Arlidge*, *ante*. Even in a court of law evidence may in proper circumstances be given by affidavit.

Housing Acts Cases.

The *audi alteram partem* rule is not observed where evidence is given by one party without an opportunity being given to the other party to contradict it. The application of this principle has caused difficulty where the Minister of Health has under the Housing Acts both executive and quasi-judicial duties. In *Errington* v. *Minister of Health*,[3] [1935] 1 K.B. 249, the court quashed an order of the Minister because of a failure to act quasi-judicially. The Minister was empowered under the Housing Act, 1930,[4] to confirm, after holding a public enquiry, clearance orders made by local housing authorities. Confirmation orders could be challenged on the ground that they were not within the powers of the Act. After an enquiry had been held, but before the order had been confirmed, there took place further communications on the subject-matter of the enquiry between the Ministry and the local authority without the knowledge of the owners who had objected to the order being confirmed. Furthermore, an official of the Ministry viewed the property in the company of officials of the local authority and formed an opinion upon it in the absence of the owners. It was held that an order made after an enquiry based on wrong material was not within the powers of the Act. Before, however, an objection is lodged, the Minister may make such enquiries as he thinks fit, and the making of such enquiries will not invalidate a subsequent confirmation order, even though an objection is lodged at a later date: *Frost* v. *Minister of Health*, [1935] 1 K.B. 286. "In so far as the

[1] *Dr. Bentley's Case* (1723), 1 Stra. 557.

[2] *E.g.* Electricity Supply Act, 1919, s. 22 (1), which provides a right of being heard.

[3] For comment on this decision, see *Frost* v. *Minister of Health*, [1935] 1 K.B. 286, and Note by E. C. S. Wade in 51 *L.Q.R.*, p. 417; see also *Robins & Son, Ltd.* v. *Minister of Health*, [1939] 1 K.B. 537.

[4] See now Housing Act, 1936, 2nd Schedule.

Minister deals with the matter of the confirmation of a clearance order in the absence of objection by the owners, it is clear that he would be acting in a ministerial or administrative capacity and entitled to make such enquiries as he thinks fit to enable him to make up his mind." Sometimes the Minister is faced with two duties and has to reconcile an executive duty under one section of an Act with a quasi-judicial duty under another. The fact that he had under consideration an objection to the confirmation of a clearance order did not debar the Minister from fulfilling his statutory duty to advise a local authority on handling overcrowding, despite the fact that the area involved by the clearance order was part of the area discussed in connection with overcrowding: *Offer* v. *Minister of Health*, [1936] 1 K.B. 40, a decision which was also based on the fact that no objection had yet been lodged, see *Frost's Case*, *ante*; *Horn* v. *Minister of Health*, [1937] 1 K.B. 164, a decision which was based on the fact that at the interview complained of the Minister did not discuss the particular site involved. It would appear that the Minister may perform his executive duties without being restricted by the need to have both parties before him, although they overlap his quasi-judicial duties, but that he (or his officers) must act judicially when the act done (*e.g.* an interview) is specifically related to the subject-matter of quasi-judicial proceedings.

Publication of Reasons.

The Committee on Ministers' Powers suggested two further principles of natural justice: (*a*) that the reasons for a decision should be made known to the parties, (*b*) that when a public enquiry is held as a means of guiding a Minister to a decision, the report of the inspector who holds the enquiry should be made available to the parties heard. The arguments for and against the publication of reports and the reasons for decisions will be discussed in Chapter 6. Neither of these suggested principles can be regarded as rules of law. It was held in the case of *Denby (William) & Son* v. *Minister of Health*, [1936] 1 K.B. 337, that there is no obligation to publish an inspector's report. Sometimes a statute requires publication; *e.g.* the Restriction of Ribbon Development Act, 1935, s. 7 (4), in connection with appeals from highway authorities, requires the Minister of Transport to publish a summary of facts as found by him and of his reasons for the decision; the Education Act, 1921, 5th Schedule, in connection with compulsory acquisition of property in London required an enquiry by an impartial person appointed by the Board of Education who must not be a government employee, and laid down a special procedure to be followed if the order made by the Board of Education was not based on the inspector's report.

By-Laws.

Unlike other delegated legislation by-laws made by subordinate

bodies may be declared invalid not only because they are *ultra vires*, but also because they are unreasonable.[1]

The courts will not, however, treat the by-laws of a public authority as unreasonable unless they are manifestly oppressive, whereas the by-laws of a trading concern, such as a railway company, will be rigorously scrutinised. In *Kruse* v. *Johnson*, [1898] 2 Q.B. 91 ; K. & L. 26, a by-law of the Kent County Council punishing the playing of musical instruments or singing in the highway within fifty yards of a dwelling-house to the annoyance of the inmates was held to be good. The court held that it should be slow to condemn as invalid on the ground of supposed unreasonableness any by-law made by a body legislating under the delegated authority of Parliament within the extent of the authority given to the body to deal with matters which concerned it.

Methods of Control.

Hitherto we have considered the principles which regulate the review of administrative powers by the courts. There must now be examined the different procedures by which the jurisdiction of the courts can be invoked. A review may take place incidentally in the course of a prosecution for an offence under a statutory regulation. It is a defence to a prosecution for an offence created by a regulation that the regulation is *ultra vires* and so invalid. Again, a civil action may be based on a claim for damages for an act which, unless justified by statutory authority, would be a wrongful act. Apart from review in the course of ordinary litigation, there are several means of directly invoking the jurisdiction of the courts to check excess or abuse of powers.

Orders of Mandamus, Certiorari and Prohibition.

At common law the principal machinery of review was provided by the prerogative writs—mandamus, certiorari and prohibition. These prerogative writs have now been replaced [2] by orders obtained by a more simple procedure of application to the King's Bench Division of the High Court.

Mandamus.

Mandamus is a peremptory order, issuing out of the King's Bench Division of the High Court, commanding a body, or person, to do that which it is its, or his, duty to do. The issue of the order is entirely a matter for the discretion of the court, which " will render it as far as it can the supplementary means of substantial justice in every case where there is no other specific legal remedy for a legal right ; and will provide as effectually as it can that others exercise their duty wherever the subject-matter is properly within

[1] There are passages in the judgment of Scott, L.J., in *Spark* v. *Edward Ash Ltd.*, [1943] K.B. 223, which appear to imply that regulations made by a Minister might be held invalid on the same grounds as a by-law. In so far, however, as it is implied that departmental regulations might be held invalid as being oppressive or unreasonable, though *intra vires*, the passages in question do not represent the law.

[2] Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 5.

its control"—*per* Lord Ellenborough, C.J., in *The King* v. *Archbishop of Canterbury* (1812), 15 East 117, 136. The order does not lie against the Crown. If a government department is acting as agent of the Crown and is responsible only to the Crown, having no duty to the subject in the matter, it is not amenable to the orders of the court in the exercise of its prerogative jurisdiction in granting or refusing mandamus: *The Queen* v. *Lords of the Treasury* (1872), L.R. 7 Q.B. 387.[1] But mandamus will lie to enforce the performance of some purely statutory duty which is allotted to the department as such, and is not exercised by it on behalf of the Crown, provided that the applicant can show that the duty is owed to himself: *The Queen* v. *Special Commissioners for Income Tax* (1888), 21 Q.B.D. 313, at p. 317. The distinction turns upon the rule that no third party (the courts) can compel an agent (the department) to do its duty to its principal (the Crown). Against other bodies or persons mandamus will only be granted where the applicant has a right to the performance of a legal duty and has no other specific or equally appropriate and convenient means of compelling its performance. He must have demanded its performance and been refused. The duty must be an imperative, and not a discretionary one, but there may be an imperative duty to exercise a discretion one way or another. The exercise of such discretion is enforceable by mandamus.

It was held in *The King* v. *Housing Tribunal*, [1920] 3 K.B. 334, that mandamus lay against the tribunal to compel it to hear and determine an appeal. Its previous decision had been given without hearing the appellants and was accordingly brought up and quashed by certiorari.[2] Again, where there had been an irregular election of aldermen to a newly created borough council, mandamus to hold a lawful election was the appropriate remedy: *In re Barnes Corporation, ex parte Hutter*, [1933] 1 K.B. 668. Mandamus has also been obtained by a ratepayer to compel the production of the accounts of a local authority for inspection by his agent: *The King* v. *Bedwelty Urban District Council, ex parte Price*, [1934] 1 K.B. 333, notwithstanding that the officers of the council concerned were liable to prosecution.[3] Where, however, a statute prescribes a specific remedy, *e.g.* complaint to a Minister, mandamus will not lie: *Pasmore* v. *Oswaldtwistle Urban District Council*, [1898] A.C. 387.

Extension of Remedy.

At one time the operation of mandamus was confined to a limited class of cases affecting the administration of public affairs, and in

[1] *Cf.* for a failure to enforce by action a duty owed to the Crown: *Gidley* v. *Lord Palmerston* (1822), 3 Brod. & B. 275; K. & L. 262; see K. & L., p. 225.

[2] P. 281, *post.*

[3] Prosecution would not have secured the production of the accounts.

particular it was invoked to compel inferior courts to proceed in matters within their jurisdiction, or public officers to perform their legal duties. But the many Acts of Parliament, largely private or local Acts, which confer powers and obligations upon public utility undertakings of all descriptions, normally require the execution of certain works for the benefit of private persons, *e.g.* landowners who may have been dispossessed of their property or some of its amenities by the undertaking. An Act may impose the duty of erecting a bridge over a new railway, or of constructing a road in place of one which has been stopped up. The execution of works of this description is enforceable by mandamus at the instance of persons aggrieved.

Prohibition.

An order of prohibition issues out of a higher court (King's Bench Division) primarily to prevent a lower court from exceeding its jurisdiction, or acting contrary to the rules of natural justice, *e.g.* to restrain a judge from hearing a case in which he is personally interested. But for many years past it has also been granted against Ministers of the Crown and public or semi-public bodies of a non-judicial character to control the exercise of judicial or quasi-judicial functions. It does not lie against private bodies, such as a social club, *e.g.* in relation to the expulsion of a member.

Scope of Remedy.

It is not clear what are the precise limitations of the writ; but it is certain that it will only lie against a body exercising public functions and cannot be used to restrain legislative powers. An attempt to invoke prohibition (together with certiorari) against the National Assembly of the Church of England and its legislative committee to restrain that body from proceeding with the Prayer Book Measure, 1928, was unsuccessful, on the ground that neither the Assembly nor the committee was empowered to act, or did in fact attempt to act, judicially in matters affecting the interests of the subject: *The King* v. *The Legislative Committee of the Church Assembly, ex parte Haynes-Smith*, [1927] 1 K.B. 491. Nevertheless, the tendency is to enlarge the scope of the writ's effectiveness. The courts exercise the power of controlling any body of persons to whom has been entrusted a "judicial" power of imposing obligations upon others. The case of *The King* v. *Electricity Commissioners, ex parte London Electricity Joint Committee*, [1924] 1 K.B. 171; K. & L. 187, is of particular interest in this connection:

> The Commissioners possessed statutory powers enabling them to draw up schemes for improving the existing organisation for the supply of electricity in districts. A scheme was not to become operative until a public enquiry had been held and other conditions fulfilled. A writ of prohibition was granted to prevent the holding of an enquiry on the ground that the scheme to be presented at the enquiry was *ultra vires*.

A public body, which could not be regarded as a court of law, was attempting to exercise powers which affected the rights of private companies responsible for the existing supply of electric current. It could not be regarded as exercising legislative, but judicial, functions in proposing to arrive at a decision on a scheme which would affect the rights of the electricity undertakings. Clearly in this sense judicial has a wide meaning not referable exclusively to what is done within the jurisdiction of a court of justice. The judgment of Atkin, L.J., as he then was, deserves careful study as affording many illustrations of the circumstances in which the courts have granted the writ in the past. It is also made clear that the common requirement of confirmation by a higher authority, even where the approval has to be that of the Houses of Parliament, does not put an order of a local authority outside the category of a judicial proceeding which can be restrained by means of prohibition. Atkin, L.J., said: "In the provision that the final decision of the commissioners is not to be operative until it has been approved by the two Houses of Parliament I find nothing inconsistent with the view that in arriving at that decision the commissioners themselves are to act judicially and within the limits prescribed by Act of Parliament, and that the courts have power to keep them within those limits." The case should also be studied in connection with certiorari.

Certiorari issues to remove a suit from an inferior court into the King's Bench Division of the High Court. It may be used before a trial is completed to prevent an excess of jurisdiction. It is invoked also after trial to quash an order which has been made without jurisdiction or in defiance of the rules of natural justice. While it is only applicable to review a judicial act, "judicial" is again used in the widest sense and is not confined to acts of bodies which would ordinarily be considered courts. "The power of obtaining an order of certiorari is not limited to judicial acts or orders in a strict sense, that is to say, acts or orders of a court of law sitting in a judicial capacity. It extends to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines the rights or property of the affected parties": *Local Government Board* v. *Arlidge*, [1915] A.C., 120 at p. 140. The applicant must show a special grievance over and above that suffered by the public at large. In *The King* v. *Hendon Rural District Council, ex parte Chorley*, [1933] 2 K.B. 696, certiorari was granted at the instance of an adjacent owner to quash a decision of a district council giving permission for development of land in an area where, under a town-planning scheme, such permission might give rise to a claim for compensation payable by the ratepayers. It was shown that a member of the council interested in the use of the land had Certiorari.

voted on the resolution. The rule lay against a county council which had given an applicant permission under its statutory powers as a licensing authority to do that which he was expressly forbidden to do by statute, *e.g.* to open a cinema on a Sunday: *The King* v. *The London County Council, ex parte The Entertainments Protection Association, Ltd.*, [1931] 2 K.B. 215. In *General Medical Council* v. *Spackman*, [1943] A.C. 627, the House of Lords quashed a decision of the General Medical Council removing a doctor's name from the medical register. The Council which was under a statutory obligation to hold a "due enquiry" had refused to hear fresh evidence to dispute a finding by the Divorce Division of the High Court that the doctor had committed adultery with a patient.

Prohibition and Certiorari Contrasted.

Certiorari is frequently sought along with prohibition, so that not merely may an *ultra vires* act be reviewed (certiorari), but its operation also restrained (prohibition). Prohibition restrains a tribunal from proceeding further in excess of jurisdiction. It lies wherever any act remains to be done in respect of which the prohibition will itself operate, *Estate and Trust Agencies* (1927) *Ltd.* v. *Singapore Investment Trust*, [1937] A.C. 898; certiorari requires the record or order of the court to be sent up to the King's Bench Division to have its legality enquired into, and, if necessary, to be quashed. The operation of the writs not infrequently overlaps; there may be a record to remove into the higher court and also an excess of jurisdiction left to prevent.

> "Wherever any body of persons, having legal authority to determine the rights of subjects and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." *Per* Atkin, L.J., in *The King* v. *Electricity Commissioners*, [1924] 1 K.B. 171 at p. 205; K. & L. at p. 188.

In accordance with the principles already stated neither prohibition nor certiorari will provide a means of appealing against the proper exercise of a discretionary power by a body to which a discretion has been entrusted by statute. The court has no power to substitute its own discretion for that of the administrative body.

Illustrations of operation of Certiorari and Prohibition.

Two decisions of the Court of Appeal illustrate the working of these orders (certiorari and prohibition). They both arose out of housing schemes prepared in terms which were not authorised by the Housing Act, 1925.[1] In *The King* v. *Minister of Health, ex parte Davis*, [1929] 1 K.B. 619,[2] a property owner in the area affected by the proposed scheme successfully applied for a writ

[1] For present procedure for challenging a clearance order or compulsory purchase order, see Housing Act, 1936, 2nd Schedule; and see *In re Bowman, South Shields (Thames Street) Clearance Order*, [1932] 2 K.B. 621, a case under the Housing Act, 1930.

[2] P. 271, *ante*.

of prohibition to prevent the Minister proceeding to consider the scheme with a view to confirmation. The scheme contained provisions *ultra vires* the Housing Act, and, therefore, it was not within the jurisdiction of the Minister to confirm it. The Act only contemplated the submission to the Minister of *intra vires* schemes for confirmation.

In the second case, *The King* v. *Minister of Health, ex parte Yaffé*, [1930] 2 K.B. 98, the scheme had been confirmed by the Minister after modification by him. The writ of prohibition was, therefore, of no avail. But the applicant applied for a writ of certiorari to review the Minister's decision. In this he was successful in the Court of Appeal. Although the Housing Act provided that the Minister's order, when made, should have statutory effect as if enacted in the Act, it was held that this did not prevent the validity of the order being enquired into by the court. The Act only contemplated orders having statutory effect, if the scheme presented had been drawn up in strict compliance with its terms. The decision was reversed by the House of Lords on the facts: *Minister of Health* v. *The King*, [1931] A.C. 494. The principle was, however, confirmed that, while the provision makes the Minister's order speak as if it were contained in the Act, the Act in which it is contained is the Act which empowers the making of the order. If, therefore, the order as made conflicts with the Act, it will have to give way to the Act.

It would seem that an order might be subject to certiorari even if approved by an affirmative resolution of both Houses of Parliament. A resolution of the two Houses is not an Act of Parliament.[1]

Importance of Writs.

Thus these orders, despite parliamentary formulae to prevent administrative acts being questioned in the courts, are still important. They provide means of questioning the legality, but not the discretion, of judicial or quasi-judicial acts (in the broadest sense) of public bodies, including government departments, as well as of courts of justice, other than the High Court, Assize Courts and the Central Criminal Court.

Statutory Machinery for Challenge.

It was formerly a frequent practice to provide by statute for the challenge by certiorari of orders which owing to the absence of a judicial element could not be challenged by certiorari at common law. Thus the Local Government Act, 1888, and the Municipal Corporations Act, 1882, provided for the challenge by certiorari of orders for payment out of county and borough funds respectively. To-day it is more frequent and indeed usual to take away the right of proceeding by certiorari and substitute a simpler statutory procedure which can sometimes only be exercised for a limited time after

[1] See the judgments of Atkin and Younger, L.JJ., in *The King* v. *Electricity Commissioners* (p. 280, *ante*), and "Departmental Legislation," by E. C. S. Wade, 5 *C.L.J.*, at pp. 89–90.

the making of an order. Thus the Local Government Act, 1933, ss. 184 and 187, provide (in lieu of the procedure by certiorari just mentioned) that any person aggrieved by an order for payment out of county or borough funds may apply to the High Court, which may give such directions as it thinks fit, and the order of the court is final. The Housing Act, 1936, s. 15, provides for an appeal to the county court within twenty-one days of the making of a demolition or closing order in respect of particular premises. A further appeal lies to the Court of Appeal on a point of law. A different procedure applies in regard to clearance orders affecting whole areas and compulsory purchase orders: Housing Act, 1936, 2nd Schedule. A period of six weeks is allowed during which an order which has been confirmed by the Minister of Health may be challenged in the High Court. Challenge is restricted to two grounds only: (*a*) that the order is not within the powers of the Act, (*b*) that the requirements of the Act have not been complied with and that, as a result, the objector has been substantially prejudiced. These orders may not be questioned by certiorari and, except as provided in the Act, may not otherwise be questioned in any legal proceedings whatsoever. In a case which turned upon a similar provision contained in the Public Works Facilities Act, 1930, it was stated by Branson, J., that, even when an order was not within the powers of the Act, it was necessary for the applicant to show that he had been prejudiced: *In re City of Manchester (Ringway Airport) Compulsory Purchase Order* (1935), 153 L.T. 219. This case was, however, doubted by the Court of Appeal in *Horn* v. *Minister of Health*.[1] The better opinion appears to be that it is so important that justice should not only be done, but should seem to be done,[2] that, though the High Court undoubtedly has a discretion, an order will be quashed whenever it is outside the powers of the Act. Where a procedure for challenge is provided by statute, it is frequently laid down that cases should be heard by a single judge of the High Court appointed by the Lord Chancellor, from whom an appeal usually lies to the Court of Appeal.[3] This provision applies to the appeals against clearance orders under the Housing Act, 1936.

Improper Assumption of Office.

The High Court may grant an injunction to restrain a person from acting in an office to which he is not entitled, and may also declare the office to be vacant. This procedure took the place of the ancient procedure of an information in the nature of a writ of quo warranto, but the principles which governed the former procedure still apply: Administration of Justice (Miscellaneous Provisions)

[1] P. 277, *ante*.

[2] *Errington* v. *Minister of Health*, [1935] 1 K.B. 249, *per* Maugham, L.J., at p. 280. This case was decided under a similar section of the Housing Act, 1930.

[3] For merits of the single-judge system, see Chap. 6, *post*.

Act, 1938, s. 9. By this means those who have improperly assumed to exercise an office may be removed. In *The King* v. *Speyer*, *The King* v. *Cassel*, [1916] 1 K.B. 595; [1916] 2 K.B. 858, quo warranto proceedings were employed to question the legality of appointments to the Privy Council. The Act of Settlement had limited the prerogative power to create Privy Councillors by excluding those born abroad, but subsequent legislation had removed this disability so far as naturalised British subjects were concerned. Quo warranto proceedings lay "for usurping any office, whether created by charter alone, or by the Crown with the consent of Parliament, provided the office be of a public nature and a substantive office, not merely the function or employment of a deputy or servant at the will and pleasure of others": *Darley* v. *The Queen* (1845), 12 Cl. & F. 520—office of City Treasurer of Dublin. Under the Local Government Act, 1933, s. 84, a local government elector may initiate proceedings either summarily or in the High Court to question the right of a person to act as a member of a local authority. The High Court may declare that the office is vacant and order the payment of penalties. A court of summary jurisdiction may impose a fine not exceeding £50 for each conviction of a person who acts while disqualified.

Injunctions.

An injunction may be claimed against a public authority by any individual who can show that he will suffer special damage as the result of contemplated illegal action, *e.g.* a public nuisance, or that he has suffered such special damages as the result of action which it is not too late to restrain. An injunction may be obtained to restrain any *ultra vires* act, *e.g.* by a ratepayer to restrain an improper expenditure of borough funds: *Attorney-General* v. *Aspinall* (1837), 2 My. & Cr. 406. An injunction can be obtained for these purposes by the Attorney-General, either at his own instance or at the instance of a relator (one who informs). A relator need have no personal interest in the subject-matter of the claim except his interest as a member of the public. The Attorney-General must be joined as a party where the individual complaining can show no special damage to himself. It is at the discretion of the Attorney-General whether or not to proceed. If the public body is doing an act which tends to injure the public, it is the right of the Attorney-General to intervene, and he will be successful, even though he cannot prove that injury will result from the act complained of. A relator action, as these proceedings are called, lies to restrain an illegal act, even though its validity could be tested by certiorari: *Attorney-General* v. *Tynemouth Corporation*, [1899] A.C. 293; or though the infringement of public rights could be visited with other penalties: *Attorney-General* v. *Sharp*, [1931] 1 Ch. 121. There are two cases where a person can sue without joining the Attorney-General: *Boyce* v.

Paddington Borough Council, [1903] 1 Ch. 109: (1) if interference with the public right also constitutes an interference with the plaintiff's private right, *e.g.* where an obstruction upon a highway is also an interference with a private right of access to the highway: *Lyon* v. *Fishmongers Co.* (1876), 1 App. Cas. 662; (2) where no private right of the plaintiff is interfered with, but he, in respect of his public right, suffers special damage peculiar to himself from the interference with a public right, *e.g.* where as a result of a public nuisance a plaintiff's premises have been rendered unhealthy and incommodious: *Benjamin* v. *Storr* (1874), L.R. 9 C.P. 400.

Declaratory Judgments.

It has already been seen that a declaratory judgment can be obtained against the Crown.[1] Order XXV., s. 5, of the Rules of the Supreme Court provides as follows:

> "No action or proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed."

It would appear that a declaration can be obtained that the judgment of an inferior tribunal is invalid as being in excess of jurisdiction.[2] This "remedy" has enabled trade unions and their members to obtain relief, though they are prevented from directly enforcing certain contracts by the Trade Union Act, 1871, s. 4: *Kelly* v. *National Society of Operative Printers Assistants* (1915), 84 L.J.K.B. 2236. It is also an obvious convenience in a dispute between two local authorities to be able to have the law determined in its application to a particular case without seeking a coercive remedy against the opposing party. Somewhat similar is the practice of local authorities agreeing to state a case on points of law for the decision of the court. An action for a declaratory judgment or the statement of a special case must be based on a concrete case which has arisen. The courts will not give answers to questions propounded in the form of hypothetical cases. Nor can the judges be asked to give advisory opinions on points of law.

Surcharge.

An example of the check which the courts can impose upon the exercise of discretionary power is to be found in the surcharge upon the individual members of a council which is responsible for excessive or illegal expenditure. The power of disallowance and surcharge is vested in district auditors appointed by the Ministry of Health.[3] A right of appeal from a surcharge ordered by a district auditor lies to the High Court, but an alternative right of appeal lies to the Minister of Health if the amount of the surcharge does not exceed £500. An unsuccessful appeal to the High Court

[1] P. 265, *ante*.
[2] *Cooper* v. *Wilson*, [1937] 2 K.B. 309.
[3] Part VI., Chap. 3, C, *ante*.

cannot be followed by an appeal to the Minister.[1] Both the court and the Minister have a power to remit the surcharge and this power may be exercised on application by the persons surcharged, even if there is no appeal from the auditor's decision, on the ground that they acted reasonably or in the belief that their action was authorised by law. The court and the Minister have discretion as to costs and may order their payment out of the fund to which the accounts relate. In *Roberts* v. *Hopwood*, [1925] A.C. 578,[2] Lord Atkinson said at p. 595:

> "A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body owes, in my view, a duty to these latter persons to conduct that administration in a fairly businesslike manner with reasonable care, skill, and caution, and with due regard to the interests of those contributors who are not members of the body."

Because local bodies have discretionary powers to fix wages for their employees, they must not, since they are handling public money, use it unreasonably, even for a lawful purpose.

Exclusion of the Jurisdiction of the Courts.

The jurisdiction of the courts to control excess or abuse of powers may be excluded by express words in a statute.[3] Thus it may be provided that confirmation of an order by a Minister shall be conclusive evidence of compliance with a statute,[4] and that the validity of a statutory order shall not be questioned in any legal proceedings whatsoever.[5] Where, however, it is merely stated that an order shall have effect as if enacted in the Act which authorised it, the courts may none the less hold the order invalid if it is inconsistent with the provisions of the Act. If an order conflicts with the Act which sanctions it being made, it must give way to the Act: *Minister of Health* v. *The King*,[6] In this case the House of Lords distinguished the earlier judgment in *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347, where the House had upheld the validity of general rules made by the Board of Trade. In both cases definite views were expressed as to the effect of the words "shall have effect as if enacted in this Act." In both cases these views were *obiter dicta*, as in the earlier case the rules, and in the later case the scheme, were held to be valid. It was therefore unnecessary to pronounce upon the effect of the words in validating an *ultra vires* order. It is, however, clear that in the later case the House of Lords was of the opinion that the words did not

[1] *The King* v. *Minister of Health, ex parte Dore*, [1927] 1 K.B. 765.
[2] P. 272, *ante*.
[3] Chap. 6, *post*, for arguments for and against such exclusion.
[4] *Ex parte Ringer* (1909), 25 T.L.R. 718.
[5] See Housing Act, 1936, p. 284, *ante*.
[6] P. 283, *ante*.

validate an order which was plainly inconsistent with the Act.[1] The Committee on Ministers' Powers expressed the view that, even where it is provided that the confirmation of an order shall be conclusive evidence of compliance with the Act, an order could be questioned if the Minister making it was acting altogether outside his province.[2] It is, however, suggested that, if there are added the words " and shall not be questioned in any legal proceedings whatsoever," [3] the jurisdiction of the courts is effectively excluded.

[1] In the earlier, but not the later, case the rules required had to be laid before Parliament, which could annul them by negative resolution. The House of Lords did not, however, distinguish the two cases on this ground. For full discussion of these two cases, see *The Parliamentary Powers of English Government Departments*, by John Willis (Harvard University Press, 1933), and Note in 60 *L.Q.R.*, at p. 325, by Dr. C. K. Allen, who regards the question as still open.

[2] *M.P.R.*, p. 40.

[3] These words have not yet been considered by the Court of Appeal or House of Lords; see, however, *Ex parte Ringer*, p. 287, *ante*.

CHAPTER 5.

DELEGATED LEGISLATION.[1]

What is Delegated Legislation?

THE function of legislation—the making of general rules—is a function of Parliament. When Parliament delegates that function we speak of delegated legislation. The term is used of (*a*) the exercise of a legislative power delegated by Parliament, or (*b*) the rules or regulations passed as the result of the exercise of a delegated legislative power.[2] The by-laws made by local authorities or railway companies are delegated legislation. Professional bodies too may be given power to enact delegated legislation, *e.g.* the Council of the Law Society (the governing body of the solicitors' profession) is given power by the Solicitors Act, 1932, to make regulations for the compulsory attendance of articled clerks at schools of law. This chapter is, however, concerned primarily with the exercise of legislative functions by government departments and such independent statutory authorities as the Assistance Board [3] or the agricultural marketing boards.[4]

Growth of Delegated Legislation.

Delegated legislation is not a new development. *The Report of the Committee on Ministers' Powers* gives examples of delegation of legislative powers in the sixteenth, seventeenth and eighteenth centuries.[5] The bulk of delegated legislation has, however, been enormously increased to meet the needs of the modern State. So long as the State existed mainly for the purpose of preserving order by repelling external aggression, administering justice and preventing crimes, Parliament was able to provide the necessary legislation. Nowadays social welfare and economic problems of a national and international character form as important a part of the business of government as the older function of preserving the peace and security of the realm. The Government provides services to advance the social welfare of the population and to some extent controls the economic resources of the State. The provision of social services involves the making of detailed regulations to provide for individual benefits. The exercise of economic control involves the imposition of a variety of restrictions and positive duties. Parliament no longer has the time nor indeed the necessary data to enable it to produce the mass of detailed regulations which the present functions of the State require. It is impossible to foresee all possibilities, and flexibility is essential. As a result Parliament tends to lay down general

[1] Reference should be made to *M.P.R.*, Section II.
[2] *M.P.R.*, p. 15.
[3] P. 189, *ante*.
[4] P. 49, *ante*.
[5] *M.P.R.*, pp. 10–15.

principles and to entrust to Ministers the task of forming the regulations necessary for their amplification. Rigid adherence to the doctrine of separation of powers has been compelled to give way to needs of public policy. The annual volume of public general statutes for 1937 occupied just over a thousand pages; statutory rules and orders for the same period occupied about 2,400 pages, though not all the latter are printed and published.

Original Legislation distinguished.

Delegated legislation should be distinguished from general legislation enacted by a process other than the normal method of passing an Act of Parliament. Prerogative legislation by Order in Council or Letters Patent is still utilised by the Colonial Office as a principal mode of enactment for newly acquired territory and for other colonial legislation. The annexation of Kenya as a colony was effected by this means in 1920.[1] Trade and commerce were to a limited degree so regulated during the First World War. In form prerogative Orders in Council do not differ from those issued under the authority of an Act of Parliament, which are delegated legislation proper, and for their contents the Government, and not the Privy Council, is responsible. Nevertheless they are examples of legislation by the King in Council without reference to Parliament.

Forms of Delegated Legislation.

Delegated legislation by Ministers of the Crown takes one of two forms: (*a*) the statutory Order in Council, (*b*) the departmental regulation. For both the department concerned is responsible. In the former case "the formal legislative act is made more national by being united with the traditions of the King in Council."[2] Regulations appear under many names: regulations, rules, orders, warrants, schemes, by-laws. The term "rules" is appropriate to an instrument regulating procedure;[3] "by-laws" imply that provisions, though of a general nature, are to have effect only in a limited area; the term "order" is used to cover varying forms of legislation as well as executive orders, though the Committee on Ministers' Powers recommended that (except for Orders in Council) it should be confined to instruments exercising executive power or giving judicial and quasi-judicial decisions, and that the term "regulation" should be used to describe an instrument by which the power to make substantive law is exercised.[4] No scientific distinction of nomenclature has in fact been adopted, nor has there been uniformity in the terms used in different Acts of Parliament or by different departments. Some improvement has been effected since 1943 as a result of criticism in Parliament and elsewhere; but the new Select Committee for scrutinising rules and orders[5] has again recommended that for the convenience of Parliament and the public

[1] See Appendix C, p. 427, *post*.
[2] *M.P.R.*, p. 26.
[3] *E.g.* Rules of court—delegated legislation enacted by the Judiciary.
[4] *M.P.R.*, p. 64.
[5] P. 294, *post*.

the different classes of delegated legislation should be classified under separate designations.[1]

Justification of Delegated Legislation.

Few to-day would contend that delegated legislation is unnecessary. The following are some of the principal reasons why it is necessary.

(1) *Pressure upon parliamentary time.* If Parliament attempted to enact all legislation itself, the parliamentary machine would break down.

(2) *Technicality of subject-matter.* Legislation on technical topics necessitates prior consultation with experts and interests concerned.[2] The giving of the power to make regulations to Ministers facilitates such consultation.[3]

(3) *The need of flexibility.* An important scheme providing for a state-regulated and state-aided educational service or a system of national insurance benefits, demands that something less cumbrous and more expeditious than an Act of Parliament shall be available to amplify the main provisions, to meet unforeseen contingencies and to facilitate adjustments that may be called for after the scheme has been put into operation. Delegated legislation fills those needs. The National Health Insurance Act, 1911, would have been a dead letter, had it not been followed over a two-year period by delegated legislation amplifying its provisions.

(4) *State of Emergency.* It has always been recognised that in times of emergency the Government needs to take action quickly and in excess of its normal powers. In most continental States provision is made for the suspension in times of emergency of those constitutional guarantees which with us are dependent on the safeguards provided by the common law. In the United Kingdom Parliament both enlarges the discretionary powers of the Government by a general enabling Act and at the end of the emergency protects its officers from vexatious actions in the courts by passing an Indemnity Bill legalising any illegalities committed *bona fide* during the period. The Government relies mainly on delegated legislation for the exercise of emergency powers, although the Crown still possesses an ill-defined residue of prerogative power capable of use in time of national danger.[4] Thus during the First and Second World Wars wide legislative powers were conferred by the Defence of the Realm Acts, 1914–15, and the Emergency Powers (Defence) Acts, 1939–40. The Emergency Powers Act, 1920, a permanent Act, enables the Executive to legislate subject to parliamentary safeguards in the event of exceptional disorder of a violent character which threatens to interfere with the supply of food and other essential

[1] H.C. 113 of 1944.
[2] Part IV., Chap. 10, B, *ante*.
[3] *M.P.R.*, Vol. II., Evidence, p. 120.
[4] Part IV., Chap. 1, C, *ante*.

services, but the Act is inadequate to put the country on a basis of war-time government.

Exceptional Types of Delegated Legislation.

Criticism centres upon particular types of delegated legislation.

(*a*) *Matters of principle.* There is a clear threat to parliamentary government if power is delegated to legislate on matters of general policy, or if so wide a discretion is conferred that it is impossible to be sure what limit the legislature intended to impose.[1] If power is delegated to legislate on matters of principle, it is essential to maintain parliamentary control over the exercise of the power. If the power of the courts to declare delegated legislation *ultra vires*[2] is to be of any real value, the delegated power must obviously be defined with reasonable strictness.

(*b*) *Delegation of taxing power.* We have seen how vital to parliamentary supremacy is the function of imposing taxation.[3] None the less the working of a tariff system has been found impracticable without delegation.[4] The five measures of 1931 previously[5] referred to were subject to a time limit, but the Import Duties Act, 1932,[6] contained no time limit. Under that Act the House of Commons surrendered to the Treasury the power to impose *ad valorem* duties and to alter the free list. Control by the House of Commons was retained by enacting that Treasury orders (which could only be imposed on the advice of an independent advisory committee) should lapse after twenty-eight days, unless earlier confirmed by a resolution of the House.

(*c*) *Exclusion of the jurisdiction of the courts.* We have seen that the jurisdiction of the courts is confined to declaring delegated legislation *ultra vires.*[7] The real control over delegated legislation must be parliamentary and administrative. Parliament can define powers clearly and scrutinise the regulations made in pursuance of delegated powers. Ministers can see that departments and subordinate bodies under their control act reasonably in the exercise of their powers. The courts can only ensure that powers are exercised *bona fide* and for the purposes defined in Acts of Parliament. They cannot ensure that they are exercised reasonably in the wide sense. None the less the control of the courts is important and should only exceptionally be excluded. The Committee on Ministers' Powers expressed the view that in exceptional cases challenge was undesirable,[7] *e.g.* town planning orders under which property changes hands or stock regulations under which money may change hands.

[1] The Committee on Ministers' Powers cites the vague power given to the Minister of Health to "make such rules, orders and regulations as he may think fit for the management of the poor," Poor Law Act, 1930, s. 136: *M.P.R.*, p. 31; see also Sir Cecil Carr, *Concerning English Administrative Law*, p. 38.

[2] Chap. 4, *ante.*

[3] Part II., Chap. 2, *ante.*

[4] Carr, *op. cit.*, p. 40.

[5] Part III., p. 94, *ante.*

[6] P. 94, *ante.*

[7] P. 284, *ante.*

They recommended, however, that, when a regulation or order cannot remain indefinitely open to challenge, *e.g.* a clearance order, there should be an initial period of challenge of at least three and preferably of six months.[1]

(*d*) *Authority to modify an Act of Parliament.* Sometimes power is delegated to modify a statute. The passing of a complicated and far-reaching statute may involve minor alterations in numerous local Acts. Particularly criticised has been the so-called "Henry VIII. Clause" enabling a Minister to modify the Act itself so far as necessary for bringing it into operation.[2] The use of this clause has in practice been innocuous and its abandonment would mean that once an Act had been passed, no defect in its provisions could be modified without amending legislation. None the less the Committee on Ministers' Powers recommended that the "Henry VIII. Clause" should never be used except for the purpose of bringing an Act into operation and that it should be subject to a time limit of one year from the passing of the Act. It is clearly dangerous in principle to permit the Executive to change an Act of Parliament.

Safeguards: (1) Parliamentary Control.

The real safeguard to avoid abuse of power to legislate must be sought in parliamentary control. If this control is to be effective, there must be adequate machinery for its exercise. Sometimes it is provided that regulations shall be laid before Parliament without prescribing what action can be taken by Parliament; sometimes that they may be annulled by negative resolution of each House within a specified period, usually without prejudice to the validity of any action previously taken under the regulation; sometimes that they shall not operate until approved by an affirmative resolution, usually of both Houses, sometimes of the House of Commons only if the regulations relate to financial provisions; sometimes regulations are laid in draft; sometimes as final regulations. Where a regulation is merely laid before Parliament, a member of the House of Commons who wishes to move its annulment must find time during the ordinary sittings of the House; this is as a rule impracticable. When regulations are expressly made liable to annulment within a stated period, a motion for annulment is exempted business and may be taken after the normal close of business, if a private member moves the prayer and can obtain enough supporters to "keep a House." When an affirmative resolution is required, the onus is on the Government to present orders for approval. The Committee on Ministers' Powers recommended [3] that, except when an affirmative resolution is required, there should

[1] *M.P.R.*, p. 62; Carr, *op. cit.*, p. 48; see Housing Act, 1936, 2nd Schedule, and p. 284, *ante*.
[2] *M.P.R.*, pp. 36–38; Carr, *op. cit.*, pp. 41–47.
[3] *M.P.R.*, p. 67.

be uniform procedure in regard to all regulations required to be laid before Parliament, viz. they should be open to annulment—not amendment—by resolution of either House without prejudice to the validity of any action already taken under the regulation.[1] The Select Committee (*post*) in 1944 recommended that the procedure of confirmation by affirmative resolution should apply to all regulations imposing taxation or modifying the terms of a statute. They further recommended that there should be a uniform period within which action should be taken.[2]

(2) Scrutiny Committee.

The Committee on Ministers' Powers further recommended the appointment of a small Standing Committee of each House to consider and report on Bills conferring law-making powers and on regulations and rules made in pursuance of such powers and laid before Parliament. In 1944 there was appointed a Select Committee of the House of Commons to consider every statutory rule or order laid or laid in draft before the House upon which proceedings may be taken in either House of Parliament (*i.e.* requiring confirmation or subject to annulment). The function of the Committee is to consider whether the attention of the House should be drawn to any regulation on any of the following grounds:—

(1) That it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any government department, or to any local or public authority in consideration of any licence or consent, or of any services to be rendered, or prescribes the amount of any such charge or payments.

(2) That it is made in pursuance of an enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specified period.

(3) That it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made.

(4) That there appears to have been unjustifiable delay in publication.

(5) That for any special reason its form or purport requires elucidation.

The Select Committee is assisted by the Speaker's Counsel. The Committee may require the department concerned to submit an

[1] In 1944 it was discovered that the National Fire Service Regulations originally made in 1941 had not been laid before Parliament. The Fire Services (Emergency Provisions) Act, 1941, required that they should be laid before Parliament "as soon as may be," and provided for annulment by a negative resolution. Lawyers disagreed as to whether the failure to lay invalidated the regulations. *Ex abundanti cautela* an Act was passed to validate the regulations and acts done under them and to indemnify those responsible: National Fire Service Regulations (Indemnity) Act, 1944. The Select Committee has recommended that all regulations which are required to be laid before Parliament should be laid within a definite number of days and that the period should be uniform.

[2] H.C. 113 of 1944.

explanatory memorandum or to send a representative to explain a regulation to the Committee. Before a report is made to the House drawing special attention to any regulation an opportunity must be given to any department concerned to furnish orally or in writing such explanations as it may think fit. The Committee has become known as the Scrutiny Committee.

(3) Publicity.

An obvious safeguard when a legislative power is delegated is adequate publicity. Reference has already been made to the practice of prior consultation with interests affected.[1] The Rules Publication Act, 1893, made provision for antecedent publication and for the sending of copies of regulations to the King's Printer. It is provided by section 1 of the Act that forty days' notice should be given in the *London Gazette* of intention to make any statutory rules, and that the notice should state where copies can be obtained by a public body. The section does not, however, apply to any regulations which are not required to be laid before Parliament, or to those required to be laid before Parliament, or to be laid in draft, for a fixed period before taking effect. Certain departments are expressly exempted from the operation of the section. Rules of court have since been excluded and, unless express provision is made, the section has no application to the statutory orders of the several departments of State created since 1893. Avoidance of antecedent publicity can also be secured by making provisional rules on the ground of urgency; such rules continue in force until rules are made under section 1, but there is no incentive, once provisional rules have been made, to convert them into non-provisional rules.[2] Moreover this section does not apply to orders (as such) as opposed to rules, regulations and by-laws. Treasury regulations made under section 3 of the Act require that there should be sent to the King's Printer "every (instrument made in) exercise of a statutory power by a rule-making authority which is of a legislative and not an executive character." All regulations sent to the King's Printer which are of a general and not local character are printed and published separately, and nearly all are published in the annual volume of Statutory Rules and Orders. The Committee on Ministers' Powers recommended that the procedure for antecedent publication should apply to all rules required to be laid before Parliament, and that publication should be a condition precedent to the coming into force of a regulation.[3] The Scrutiny Committee have drawn attention to the needless technicalities in the provisions and operation of the Rules Publication Act.[4]

[1] Part IV., Chap. 10, B, *ante*.
[2] See *M.P.R.*, pp. 44–48.
[3] For detailed recommendations, see *M.P.R.*, p. 66.
[4] H.C. 113 of 1944.

The Rule of Law.

There has already been discussed the relationship of delegated legislation to the rule of law. Critics of the departments are apt to forget that every effort is usually made to ensure that regulations are drawn in such a way as to provide for all possible contingencies and thus eliminate the elements of uncertainty and inability on the part of persons affected to foresee the consequences of the enactment. Acts of Parliament conferring powers are frequently wide in their terms; regulations made under them usually avoid vague propositions and when they sub-delegate powers, *e.g.* to local authorities, do so in full and clear terms. Indeed, the citizen is more troubled by the bulk and complexity than the generality of delegated legislation.

Administrative Quasi-Legislation.

A development is the growth of what a writer has recently described as "administrative quasi-legislation." [1] Government departments have adopted the practice of issuing pronouncements stating the official point of view of doubtful points in statutes, or announcing concessions that will be made in the application of statutes to individual cases. In 1944 the Chancellor of the Exchequer presented to Parliament a twenty-page list of extra-statutory war-time concessions given in the administration of inland revenue duties.[2] The Finance Acts remain on the statute book, but certain provisions cease to represent the law as applied in practice. Sometimes arrangements made administratively affect the rights of one subject against another. Thus under section 29 of the Workmen's Compensation Act, 1925, it is a defence to a claim by a workman for damages at common law that he has accepted compensation under the Act. In 1942, the Home Office announced in the House of Commons that employers' organisations and insurance interests generally had agreed not to raise this defence, provided that proceedings were started within three months of the accident. As a result the necessity of remedial legislation was avoided. It has been rightly pointed out that without any change being made in the law a substantial change has been made in the advice which a solicitor should give his client. It is at least essential that there should be some systematic publication of administrative notifications.[3]

[1] "Administrative Quasi-Legislation," by R. E. Megarry, 60 *L.Q.R.*, p. 125.
[2] 1944, Cmd. 6559.
[3] As to publication of decisions of administrative tribunals, see Chap. 6, *post*.

CHAPTER 6.

ADMINISTRATIVE JUSTICE.

Special Tribunals.[1]

JUST as delegated legislation is no new thing, so England has for many centuries had courts that can be called special. Mediaeval merchants had their courts of pie poudre; the tin miners of Devon and Cornwall had their courts of Stannaries. Most of the old special courts have been absorbed in the common law system, though ecclesiastical courts have survived. But the same growth of governmental activities and introduction of new services provided by the State that has led to an increase in the volume of delegated legislation has led to the creation of numerous new special tribunals for the settlement of disputes or determination of rights. The introduction of each new social service has involved both delegated legislation and administrative justice. Thus the National Insurance Act, 1911, was implemented by delegated legislation and affords an illustration not only of the legitimate use of the Henry VIII. clause,[2] but also of the adjudication of disputes by an administrative authority.[3] Innumerable issues of a judicial or quasi-judicial kind arise in the course of administration of the public services, particularly those which affect the individual welfare of large sections of the community. The administration of many services, *e.g.* housing, highways, town-planning, can only be carried on by the compulsory (if need be) acquisition of privately owned property. The owners are involved in disputes with governmental authorities, central and local, and means have to be devised for the settlement of such disputes. Again, legislation may confer the right to benefits on sections of the community, *e.g.* Widows', Orphans' and Old Age Pensions Acts and the Unemployment Insurance Acts. A tribunal must be able to determine whether a claimant is entitled to a pension. Sometimes the determination of disputes is entrusted to a Minister rather than to a special tribunal, but normally this is not so when the issue is strictly judicial (an issue involving the application of law to facts) rather than quasi-judicial (an issue usually involving the ascertainment of facts but where the final decision must be mainly related to administrative policy). It is frequently laid down that before giving a decision, *e.g.* confirming a compulsory purchase order under the Housing Act, 1936, a Minister must hold a public enquiry through one of his officers.

[1] For an account of Special Tribunals, see Jackson, *The Machinery of Justice*, Chap. VI.

[2] P. 293, *ante*.

[3] *M.P.R.*, p. 96.

Reasons for Administrative Justice.

The reference of disputes to special tribunals, the members of which are frequently appointed by Ministers, has caused anxiety to those who cherish the sanctity of the common law—and they are not exclusively confined to the legal profession—lest the position of the judiciary and the influence of the law should be impaired. Modern problems cannot, however, be solved by a rigid application of the doctrine of separation of powers; there must be considered what Lord Greene, M.R., has called [1] the functional capacity of the judicial machine. Constitutional machinery must be suited to its intended product and must be able to satisfy the demands made upon it.[2] The right of access to the courts has been and is a bulwark of our liberties and must be preserved, but we shall not assist its preservation by asking the Judiciary to undertake tasks which do not fall within its proper sphere. Many tasks performed by the Judiciary involve the exercise of discretion. In particular this applies to the passing of sentence upon a convicted criminal. A judge as well as another man may exercise discretion fairly and wisely, but in general "the Judiciary is not concerned with policy," nor is it for the Judiciary to decide what is in the public interest.[3] Modern planning involves the grant of powers which are not suitable for reference to the courts. "Questions which involve the conferring of rights or the taking away of rights on the basis of what a tribunal thinks is reasonable on the facts of the individual case are not, in general, suitable for decision by a court of law." [3] There is a widespread feeling too that litigious procedure does not produce the right atmosphere for the working of a social insurance scheme. The courts too are expensive and not speedy. The implementation of a new policy necessitates the speedy, cheap and decentralised determination of a very large number of individual cases. For such work the courts are not suited. Moreover the courts, influenced by the principle of interpretation that the common law can only be changed by express words or necessary intendment,[4] have approached the task of interpreting the social legislation of the present century with a natural bias in favour of the common law. The judges cannot, however, be fairly blamed so long as they are confined to fixed rules for interpreting the meaning of statutes and are not allowed to examine the purpose of the legislation, so far as it is not ascertainable from the words of the statute. None the less Parliament, aware of judicial methods of interpretation, tends to entrust the determination of disputes arising from social legislation to special tribunals rather than to the courts.

[1] "Law and Progress," Haldane Memorial Lecture, published in 94 *Law Journal*, October 28, November 4, and November 11, 1944.
[2] Lord Greene, *op. cit.*
[3] Lord Greene, *op. cit.*
[4] See, however, p. 42, *ante*, note 2.

The difficulty has been well put by Dr. Jackson: [1] "Social legislation can rarely be comprehended by seeing its effects as solely an issue between two individuals, but the isolated issue is the centre of traditional common-law technique." On the other hand, as Lord Greene has pointed out, the Legislature must not adopt vague language in the hope that the judges will, somehow or other, interpret it in such a way as to make it work. "Policy is not the concern of the judges save in so far as the manifest objects of the statute, as appearing on its face, may provide a context pointing to one interpretation rather than another."

Merits of the Courts.

The necessity of administrative justice must not, however, lead us to underrate the merits of our traditional legal system. Jurisdiction ought not lightly to be given to special tribunals rather than to the courts of justice and, so far as is practicable, the merits of the traditional system should be embodied in the new. It is unnecessary to stress the value of an independent Judiciary. To some extent independence can be secured by entrusting to the Lord Chancellor the appointment of chairmen of special tribunals. Many appointments are, however, made by the Ministers responsible for the administration of the services in question and are appointments for a short period of years. There cannot be the same degree of independence when a paid member of a tribunal is eligible for re-appointment by a Minister. The legal system based on centuries of experience ensures that irrelevant material is excluded and that decisions are given in accordance with accepted principles. Lawyers are trained to apply principles and weigh evidence. The courts follow precedent and publish the reasons for their decisions. The right to be represented by a professional advocate is an important feature of the legal system, which is not always allowed before an administrative tribunal.[2]

Varied functions of Special Tribunals.

The functions of special tribunals are too various to permit of any scientific classification. They embrace, *inter alia*, the determination by courts of referees of rights to benefits under the Unemployment Insurance Act, 1935 (ss. 41 and 43); the assessment of compensation for compulsory acquisition or requisition of property by the General Claims Tribunal under the Compensation (Defence) Act, 1939; the granting of licences by the Area Traffic Commissioners under the Road Traffic Act, 1930; the fixing of rates by the Railway Rates Tribunal; the exercise of discipline over members of a profession by, for example, the General Medical Council; the imposition of penalties for the enforcement of a marketing scheme in a particular industry by a marketing board. Bodies like the Railway Rates Tribunal and the Area Traffic Commissioners,

[1] Jackson, *op. cit.*, p. 217.

[2] *E.g.* Before Courts of Referees under the Unemployment Insurance Act, 1935.

exercise executive as well as quasi-judicial duties. Some, such as the Railway and Canal Commission and the Railway Rates Tribunal, are courts of record and follow closely the procedure of a court of law; the majority are more informal and flexible in their methods, although their procedure is usually prescribed by rules.

General Considerations.

In regard to all special tribunals irrespective of their functions the following questions are of importance to the constitutional lawyer: (*a*) Do they determine strictly judicial or only quasi-judicial issues? (*b*) Are their decisions final? We have seen that, unless a statute provides for an appeal, the jurisdiction of the High Court over administrative tribunals is confined to the control of excess of jurisdiction and the enforcement of the rules of natural justice. Sometimes an appeal lies from one ministerial tribunal [1] to another or to a Minister; sometimes there is an appeal on fact and law; sometimes on law only; sometimes an appeal lies to the County Court; sometimes to a single judge of the High Court whose decision is final; sometimes to the High Court and thence to the Court of Appeal and House of Lords. (*c*) How are they appointed? Sometimes a ministerial tribunal is appointed by the Minister concerned in the dispute; sometimes by the Lord Chancellor; sometimes by the Lord Chancellor and the Minister acting together. (*d*) Who are their personnel? Sometimes tribunals are composed of government officials; sometimes provision is made for an independent chairman with legal qualifications. There is in England no scientific system of administrative tribunals, for the simple reason that, like all our institutions, they have been evolved piecemeal to solve an urgent problem rather than in pursuance of a blue-print system. Suggestions for a system of administrative courts have twice been rejected by authoritative committees.[2] The merits and demerits of special tribunals can therefore only be appreciated after some consideration of the various types of tribunal that have been established.

Special Commissioners of Income Tax.

The Special Commissioners of Income Tax hear appeals on income-tax matters from the rulings of inland revenue officials. They are a body of whole-time officials appointed by the Treasury and holding office during pleasure. The Commissioners can be required to state a case for the opinion of the High Court on a point of law. Of this body the Committee on Ministers' Powers stated:[3] "By common consent this tribunal gives general satisfaction by its impartiality, in spite of the fact that its members are

[1] A tribunal appointed by a Minister.

[2] The Committee on Ministers' Powers and the Departmental Committee on the Imposition of Penalties by Marketing Boards and other Similar Bodies (p. 50, *ante*).

[3] *M.P.R.*, p. 87. The Committee on Ministers' Powers regarded the Commissioners as a specialised court, but they are more properly regarded as a ministerial tribunal; see Jackson, *op. cit.*, p. 289.

not only appointed by the Treasury, but may, when not performing judicial duties, actually act as administrative officials. All we can say about it is that it is a standing tribute to the fair-mindedness of the British Civil Service; but the precedent is not one which Parliament should copy in other branches of administration."

Railway Rates Tribunal.

The Railway Rates Tribunal has jurisdiction over railway rates and charges and determines important questions of policy relating to the carriage of passengers and merchandise. The Tribunal consists of three members appointed on the joint recommendation of the Lord Chancellor, the President of the Board of Trade, and the Minister of Transport. One member must be experienced in commercial affairs, one in railway business and the president must be an experienced lawyer. The president holds office during good behaviour, but can be removed on the joint recommendation of the three appointing Ministers. The other members hold office for seven years and are then eligible for re-appointment.

Professional Tribunals: Discipline Committee (Solicitors).

The Discipline Committee under the Solicitors Act, 1932, affords an example of a professional tribunal. It is a committee established for the purpose of hearing applications against solicitors, either to strike them off the roll or to compel them to answer allegations made against them by clients. This committee is appointed by the Master of the Rolls. For hearing of applications there sits a board of at least three members who are practising solicitors. The committee has power to order a solicitor to be struck off the roll, to suspend him from practice or to order him to pay costs. It acts as a judicial body hearing formally applications by complainants, administering oaths and generally conducting its procedure as a court of law. Every order made by the committee must be prefaced by a statement of the findings in relation to the facts of the case. An appeal from an order of the committee lies to the High Court.

Ministerial Tribunals and Ministers exercising "judicial" and "quasi-judicial" powers.

The methods of appointing ministerial tribunals and the provisions that are made for appeal are various. Instances of entrusting quasi-judicial decisions to Ministers will also be found in Chapter 4. Claims for benefit under the Unemployment Insurance Act, 1935, are submitted to an insurance officer appointed by the Minister of Labour. The insurance officer [1] may either allow the claim or refer the matter for decision to the court of referees (which consists of an equal number of representatives of employers and insured contributors and a chairman, who is usually a lawyer appointed by the Minister), or on certain grounds specified in the Act may himself disallow the claim, subject to an appeal to the court of referees. Elaborate provision is made for appeals from the decisions of courts of referees to the umpire (a lawyer) appointed by the Crown; the

[1] Unemployment Insurance Act, 1935, s. 43.

umpire's decision is final. The same Act provides [1] that the question whether any employment or class of employment is such as to make a person engaged therein an employed person and therefore insurable under the Act (a judicial issue) shall be determined by the Minister (who may, if he wishes, refer the matter direct to a single judge of the High Court who is nominated by the Lord Chancellor), subject to a right of appeal to that judge whose decision is final.

The Road Traffic Act, 1930, as subsequently amended entrusts the grant of licences for public service vehicles to area traffic commissioners appointed by the Minister of Transport. The Road and Rail Traffic Act, 1933, entrusts to the same commissioners the grant of licences for goods vehicles on roads. In the former case there is an appeal from the decision of the commissioners to the Minister; in the latter case to an appeal tribunal appointed by the Minister, of which the chairman must be a person of legal experience, in regard to whose appointment the Minister must consult the Lord Chancellor.

Under the Pensions Appeal Tribunal Act, 1943 (which deals with war pensions), there is an appeal from decisions of the Minister of Pensions to a tribunal appointed by the Lord Chancellor. A tribunal consists normally of a legal chairman, a medical practitioner and a representative of the claimant's service, but, when an appeal relating to degree of disablement is heard, an additional medical practitioner takes the place of the legal chairman. Either the claimant or the Minister may with the leave of the tribunal or of the High Court appeal on a point of law from the tribunal to a single judge of the High Court appointed by the Lord Chancellor.[2]

Under the Food and Drugs (Milk and Dairies) Act, 1944, dairy farmers must be registered and the Minister of Agriculture and Fisheries may refuse to register or may cancel the registration of a dairy farmer whose premises are not in a condition that will allow him to comply with the Minister's regulations. The decision is left to the Minister, but he is assisted by a fact-finding tribunal appointed by himself and must accept as conclusive the decision of a majority of the tribunal on the facts.

Summary.

The future of administrative justice is still uncertain. The following recommendations in regard to it would perhaps win fairly general acceptance.

1. A distinction should be made between judicial and quasi-judicial issues.[3] Judicial issues should not be entrusted to Ministers, and when they are entrusted to ministerial tribunals,

[1] Unemployment Insurance Act, 1935, ss. 4 and 84.

[2] The appointment of particular judges to hear appeals under particular statutes ensures familiarity with the subject-matter and the policy involved.

[3] *M.P.R.*, p. 93.

there should be legal chairmen preferably appointed by the Lord Chancellor.

2. Quasi-judicial issues are frequently entrusted to Ministers.[1] The rules of natural justice cannot normally be applied so as to prevent a Minister from adjudicating upon a dispute on the ground that he is interested in the policy involved. Final decisions on policy must be taken by Ministers responsible to Parliament. Before, however, a Minister can exercise a discretionary power, the facts must be established. The finding of facts cannot always easily be divorced from the advice that must be given to a Minister on policy and in such cases it is difficult to improve upon the procedure of a public enquiry. Wherever possible the finding of facts should be entrusted to an independent fact-finding tribunal (a quasi-jury system). Lord Greene has suggested that tribunals of this character might be selected from panels of suitable persons with legal chairmen; and with an official of the department concerned as an assessor.[2]

3. The supervisory jurisdiction of the High Court should be vigilantly maintained and there should always be a right of appeal to the High Court on points of law.[3]

4. The reasons for decisions should be made available to the parties and epitomes of leading cases should be published.[4] The Committee on Ministers' Powers also strongly recommended [5] that the reports of inspectors who hold statutory public enquiries should be published. Judicial opinion has, however, been very doubtful of the wisdom of this recommendation.[6]

5. The right to be represented by counsel or solicitor is one of the surest defences of the subject and it ought not to be taken away save in cases of a very simple description, and even in these a party should be entitled to have someone to appear for him.[7]

Lord Greene, M.R., has thus summed up the matter: "It is only certain classes of questions which are suitable for submission to a special tribunal to the exclusion of the courts. In deciding whether a case falls within these classes, it is relevant to consider the number of individuals likely to be affected and their probable pecuniary position; the necessity or otherwise of providing a speedy and inexpensive procedure and one affording opportunities for decentralisation; whether the questions likely to arise are predominantly questions of fact, and whether expert knowledge and experience are desirable for their decision; and the extent to which the jurisdiction is to be based on discretion rather than on fixed rules and precedents.

[1] *M.P.R.*, p. 79. [2] Lord Greene, M.R., *op. cit.*
[3] *M.P.R.*, p. 98. [4] *M.P.R.*, p. 116. [5] *M.P.R.*, p. 106.
[6] *M.P.R.*, pp. 103–107; *Denby (William) and Son* v. *Minister of Health*, [1936] 1 K.B. 337.
[7] *Cf.* Lord Greene, M.R., *op. cit.*

In all cases there should be a right of appeal to the courts on questions of law. In no circumstances should the power of the courts to restrain a special tribunal from exceeding its jurisdiction be taken away. Each particular piece of legislation should be considered in relation to its special character in the light of the foregoing principles."

The conclusion of the whole matter is perhaps that no hard-and-fast rules can be laid down. The rule of law can exist without a single system of judicature, provided that the essential requirements of justice are observed.

PART VIII.

THE CITIZEN AND THE STATE.

Law of the Constitution, by A. V. Dicey, 9th ed., Part II. (The Rule of Law), Chaps. V., VI. and VII., and Appendix, Section II.

INTRODUCTORY

No constitutional Guarantees.

WE have already seen [1] that under the constitution there are no formal guarantees of liberty apart from the declarations of rights contained in the ancient charters and the restrictions on the arbitrary power of the Crown imposed by the Revolution Settlement of 1689. The citizen may go where he pleases and do or say what he pleases, provided that he does not commit an offence against the criminal law or infringe the private rights of others. If his legal rights are infringed by others, *e.g.* by trespassing upon his property or defaming his reputation, he may protect himself by the remedies provided by the law. It is in the law of crimes and of tort and contract, part of the ordinary law of the land, and not in any fundamental constitutional law, that the citizen finds protection for his liberty, whether it is infringed by officials or by fellow-citizens. In times of emergency the Executive is accorded special powers by Parliament, but there are no formal guarantees—such as are to be found in a constitutional code formally enacted—which have to be suspended. It follows that a text-book on constitutional law can only deal in bare outline with the law relating to the fundamental freedoms, such as freedom of the person, free speech, free elections. For detail the student must turn to text-books covering the branch of the law concerned. Freedom of speech means that a man may say whatever will not expose him to a prosecution or a civil action for defamation. To know what utterances will so expose him the citizen must familiarise himself with the intricacies of the law of defamation. The enjoyment of property is conditioned by the common law principle that one must use one's property in such a way as not to inflict injuries upon one's neighbour, as well as by the various conditions and obligations, some of which are onerous, imposed by modern statutes in an age which has seen the arrival of the collectivist State.

[1] Part I., p. 2, *ante*; Part II., p. 55, *ante*.

CHAPTER 1.

FREEDOM OF PERSON AND PROPERTY.

A.

Personal Freedom.

Justification for Imprisonment.

A BRITISH subject cannot claim that freedom is his special privilege, but he can, nevertheless, protect himself by proceedings in the courts against those who interfere with his liberty. A privilege is of little use unless it is protected and enforced. Under English law interference with freedom, *i.e.* physical coercion and restraint, can only be justified on certain grounds. If none of these be present, the person detained has a cause of action against his gaoler, or he can prosecute him for assault. The principal grounds are:

(1) Arrest and detention, when permitted by law, on a criminal charge.

(2) Sentence of imprisonment or detention, *e.g.* in a Borstal Institution, after conviction on a criminal charge.

(3) Imprisonment for civil debt and for contempt of court,[1] including imprisonment for contempt of either House of Parliament.

(4) Detention under the law relating to lunacy and mental deficiency, or detention in an institution under the poor law, or detention of a child in need of care or protection under the Children and Young Persons Acts, 1933 and 1938.

(5) The exercise of parental authority over an infant. A husband has no such authority over his wife: *The Queen* v. *Jackson,* [1891] 1 Q.B. 671.

Arrest with Warrant.

The extent of the power of arrest and the kindred power of search has been discussed in many leading cases of constitutional importance. Normally an arrest is effected by a police officer who acts on a written warrant for arrest granted by a justice of the peace or other judicial authority empowered to issue warrants after application (an information) supported by oath. The warrant must indicate specifically the person whose arrest is to be effected. There is no power to issue a general warrant to arrest an unnamed person.

Arrest without Warrant.

More complicated is the extent of the power and duty of police officers and private persons to arrest without warrant where they

[1] Since the Debtors Act, 1869, imprisonment for debt is confined to the case of persons of proved capacity to pay who decline to obey the order of the court to satisfy a judgment debt or other order of a court for payment.

suspect that a crime has been committed or to prevent the commission of a crime. The Executive has no power to interfere, through the police or otherwise, with the personal freedom of the subject by means of arbitrary arrest, for the plea of an act of State is no defence to an action brought by a subject in defence of his private rights[1]: *Entick* v. *Carrington* (1765), 19 St. Tr. 1030; K. & L. 145. There are, however, numerous occasions where arrest without warrant is justified either by common law or statute.[2] The powers of a police officer are wider than those of a private citizen. Anyone, whether police officer or private citizen, is required by law to arrest any person who in his presence commits a treason or felony or dangerous wounding.[3] A police officer must, and a private person may, also prevent such crimes, and indeed any breach of the peace, by detaining temporarily any person plainly about to commit such an offence. There is also power to arrest without a warrant any person reasonably suspected of having committed treason or a felony or dangerous wounding. In such a case, however, a private citizen would have no justification if the crime in question had not in fact been committed by anyone: *Walters* v. *W. H. Smith & Son, Ltd.*, [1914] 1 K.B. 595. Any passer-by may be called upon to assist a constable who has seen a breach of the peace committed by more than one person, or who has been assaulted or obstructed in the arrest of a felon and has had reasonable necessity for calling upon others to assist him. To refuse assistance in such circumstances is a misdemeanour: *The Queen* v. *Brown* (1841), Car. & M. 314; K. & L. 364. It has been held that a police officer may enter private premises to prevent a breach of the peace, and *per* Hewart, L.C.J., to prevent the commission of any offence that he reasonably believes is imminent or is likely to be committed: *Thomas* v. *Sawkins*, [1935] 2 K.B. 249.[4] Numerous statutory provisions authorise a police officer to arrest without warrant in particular cases.[5]

General Warrant Cases.

The principle that a plea of the public interest does not justify a wrongful act was established by the eighteenth-century cases known as the *General Warrant Cases*. The practice of issuing general warrants to arrest unspecified persons and to search property is said to have originated with the Court of Star Chamber. It is obviously a powerful weapon to assist an embarrassed Executive to obtain

[1] P. 127, *ante*.

[2] Kenny, *Outlines of Criminal Law*, 15th ed., by G. Godfrey Phillips, pp. 528–31.

[3] It has for a long time not been the practice to prosecute a private person for failure to arrest a felon, unless he has been called upon by a police officer for assistance. The duty, however, exists.

[4] For discussion of this case, see "*Thomas* v. *Sawkins*: A Constitutional Innovation," 6 *Cambridge Law Journal*, p. 22, and Dicey, *op. cit.*, pp. 573–575.

[5] Kenny, *op. cit.*, pp. 529–31. The complicated state of the law is well illustrated by *Ledwith* v. *Roberts*, [1937] 1 K.B. 232, and *Gorman* v. *Barnard*, [1940] 2 K.B. 570.

material upon which to formulate charges against suspected persons. At a later stage the practice was authorised by the Licensing Act, 1662, for use by a Secretary of State to control publication of unlicensed material, and such warrants continued after the lapse of that Act in 1695. The *General Warrant Cases* arose out of the attempt of George III.'s Government to stifle the political activities of John Wilkes and the publication known as the *North Briton*. Even at a later date the severity of the law against seditious publications was maintained largely by executive action, but the cases decided once and for all the illegality of general warrants and thus deprived the Executive of a formidable instrument of oppression.

Of these three cases *Leach* v. *Money* (1765), 19 St. Tr. 1002, decided that a general warrant to arrest unnamed persons (the printers and publishers of the *North Briton*), against whom a charge has not yet been formulated, was illegal; *Wilkes* v. *Wood* (1763), 19 St. Tr. 1153, that the papers of an unnamed person could not be seized on a warrant of this description; *Entick* v. *Carrington* (1765), 19 St. Tr. 1030; K. & L. 145, that there was no inherent power in the Secretary of State as a Privy Councillor[1] to order an arrest except in cases of treason, and that a general warrant as to the papers of a named person was illegal. The sequel to these cases was a successful action against Lord Halifax as the Secretary of State who had issued the warrants. A modern decision has, however, seriously diminished the protection afforded by *Entick* v. *Carrington*. The police have a right by common law to search the person of anyone who is arrested on a warrant and in practice the search extends to anything in the possession and control of arrested persons which may be relevant to the charge brought against them. It is also customary to search all persons taken into custody on a serious charge, whether arrested on a warrant or not. In *Elias* v. *Pasmore*, [1934] 2 K.B. 164, it was held that upon the arrest by lawful process of an accused person the police can search the premises where the prisoner is arrested and seize material which is relevant to the prosecution for *any* crime committed by *any* person, not merely by the prisoner himself.[2] The decision does not, however, justify the wholesale seizure of the contents of the premises except in so far as any of the contents are evidence of the commission of an offence by someone.

Search Warrants.

There are a number of cases where search warrants may lawfully be issued under the authority of a statute. Such cases in effect form exceptions to the rule that general warrants are illegal. The oldest, and, indeed, one which was admitted in *Entick* v. *Carrington* (*ante*) to exist at common law, permits the search of premises which are suspected of being made a receptacle for stolen goods: *Jones* v.

[1] All Privy Councillors are now Justices of the Peace and can therefore commit for any indictable offence.

[2] See "Police Search," by E. C. S. Wade, 50 *L.Q.R.*, p. 354.

German, [1896] 2 Q.B. 418;[1] the more important from the constitutional point of view are those conferred by the Official Secrets Act, 1911, s. 9; and the Incitement to Disaffection Act, 1934, s. 2 (2); the former provision reads as follows:

> (1) If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that an offence under this Act has been, or is about to be committed, he may grant a search warrant authorising any constable named therein to enter at any time any premises or place named in the warrant, if necessary, by force, and to search the premises or place and every person found therein and to seize . . . anything which is evidence of an offence under this Act having been or being about to be committed. . . .
>
> (2) Where it appears to a superintendent of police that the case is one of great emergency and that in the interests of the State immediate action is necessary, he may by a written order . . . give to any constable the like authority. . . .

In the Incitement to Disaffection Act, 1934,[2] a High Court judge is substituted for a justice of the peace, and elaborate restrictions are imposed upon the right to search (s. 2 (2)–(4)).

Under the authority of various statutes (some seventy in all, apart from war-time legislation) search warrants may be issued, *e.g.* for explosive substances intended to be used for felonious purposes; for unlicensed firearms; for forged documents and instruments of forgery; for counterfeit coins and coinage tools; for goods which infringe the provisions of the Merchandise Marks Act, 1887; for obscene books and pictures; for blasphemous and obscene libels. Search for a woman or girl detained for immoral purposes, or for ill-treated or neglected children, may be authorised by warrant. In certain special cases under the Larceny Act, 1916, s. 42 (2), any constable may be authorised in writing by a chief police officer without a justice's warrant to search premises for stolen property.

Remedies for Infringement of Freedom.

For interference with freedom of the person on any grounds other than those permitted by law, the subject has four types of remedy, if the first may properly be called a remedy at all. These are: self-defence, a prosecution for assault, an action in respect of wrongful arrest, and the prerogative writ of habeas corpus. The remedies are available equally against an official or a private fellow-citizen.

Self-Defence.

Self-defence is an extra-judicial remedy. It is inexpedient to resort to self-defence to resist arrest by a police officer, because, if the resistance cannot be justified on this ground, the consequential assault of the officer is aggravated by reason of his being a policeman. Although the law is by no means clear, self-defence does not appear to mean that the use of any amount of necessary force is lawful. The amount of force used must

[1] Extended to goods obtained by other fraudulent practices by the Larceny Act, 1916, s. 42 (1).

[2] P. 330, *post*.

not merely be necessary for the protection of liberty, which includes freedom from interference both for one's person and property, but also proportionate to the harm it is intended to avert. For example, if a person, walking along the coast alone, is compelled to turn aside from his path by the aggression of three men who accost him, he is not at liberty to shoot them dead, merely because they threaten to assault him if he does not turn back. But if the same person is surrounded by the trio on the top of Beachy Head and they gradually force him to the cliff's edge, thereby imperilling his life, it is both necessary for the protection of his person and also proportionate to the harm which he desires to avert from himself, namely death, that he should shoot his aggressors. There is some authority for saying that a man who is set upon in his own house may shoot to kill anyone who seeks forcibly to evict him, because he cannot reasonably be expected to retreat further. In *The King* v. *Hussey* (1925), 41 T.L.R. 205, a conviction for unlawful wounding was quashed, the circumstances being that the tenant shot his landlord through the keyhole, while the latter and some friends were seeking forcibly to evict him.

Prosecution for Assault and Action in respect of Wrongful Arrest.

A civil action for damages lies for assault or false imprisonment; further, an action for malicious prosecution may be maintained by any person who is prosecuted for an offence in the criminal courts maliciously and without reasonable and probable cause. These remedies may be used against anyone, including public officials, police officers and keepers of mental hospitals. In addition, criminal proceedings may be brought for assault, and it is in the criminal law that the greater safeguard of the subject is provided against his fellow-citizen's interference with personal liberty.[1]

Prerogative Writ of Habeas Corpus.

It is not sufficient that the subject should be able to defend himself or pursue his remedy under the ordinary law in the courts. For he may be detained by order of the State, or, for that matter, by an individual, and so not be in a position to institute legal proceedings. Accordingly the law of England provides in the writ of habeas corpus a process by which a person who is confined without legal justification may secure release from his confinement.[2] The wrongdoer is not thereby punished, but the person imprisoned procures his release and is then at liberty to pursue his remedies against the wrongdoer in the ordinary way. The writ of habeas corpus is with one exception available to all persons within the

[1] Certain prosecutions require the consent of the Attorney-General (*e.g.* prosecutions under the Official Secrets Acts), but in general any person may initiate a prosecution for any criminal offence.

[2] For the equivalent of the process in Scotland the Criminal Procedure (Scotland) Act, 1887, s. 47, superseding the Act of 1701 "for preventing wrongous imprisonment and against order and delays in trials" which now only applies to persons in prison on a charge of treason.

King's protection, including any alien enemies who may be permitted to be at large in time of war. It is not, however, available to an enemy who is a prisoner of war nor to an interned enemy alien, nor can a notice of intended internment be challenged by application for the writ.[1] The following passage from Blackstone describes the nature of the process, namely, the prerogative writ of habeas corpus:

> The great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum et recipiendum*, to do, submit to and receive whatsoever the judge or court awarding such writ shall consider in that behalf. This is a high prerogative writ, and therefore by the common law issuing out of the Court of King's Bench not only in term time, but also during the vacation by a *fiat* from the chief justice or any other of the judges and running into all parts of the King's dominions; for the King is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted.[2]

Again, Broom says:[3]

> "This great constitutional remedy rests upon the common law declared by Magna Carta and the statutes which affirm it, rests, likewise, on specific enactments ensuring its efficiency, extending its applicability, and rendering more firm and durable the liberties of the people . . . and the right to claim it cannot be suspended, even for one hour, by any means short of an Act of Parliament."

Procedure.

The writ of habeas corpus is obtainable by any person on behalf of the prisoner as well as by the prisoner himself. This is an important safeguard, though in practice every facility is granted to a person in prison to make application for the writ, if he so wishes. The procedure is as follows: in order to avoid the inconvenience of producing the prisoner unnecessarily, application is made to a judge in chambers, or to the Divisional Court, for a rule *nisi* for the issue of the writ addressed to the person who detains the prisoner, ordering him to appear and show cause before a Divisional Court of the King's Bench Division (or, in vacation time, before any judge of the High Court), why the issue of the writ against him should not be made. This application is granted as a matter of course, if *prima facie* grounds are shown. Appearance has to be made on the day named in the rule *nisi*. Argument on the merits of the

[1] *The King* v. *Vine Street Police Superintendent, ex parte Liebmann*, [1916] 1 K.B. 268; Sir Arnold McNair (*Legal Effects of War*, 2nd ed., Cambridge University Press) suggests (p. 56, note 5) that the reason is to be found in the prerogative of the Crown to wage war and incidentally to capture enemy persons and hold them in captivity.

[2] 3 *Bl., Commentaries*, p. 131.

[3] See *Constitutional Law*, 2nd ed., p. 223, cited by Lord Shaw of Dunfermline in *The King* v. *Halliday, ex parte Zadig*, [1917] A.C., at p. 296.

application then takes place and, if the court decides that the application is justified, the rule is made absolute by ordering the respondent to produce the prisoner on an appointed day, whereupon he is released. This procedure may be illustrated by the following documents taken from *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A.C. 603 ; K. & L. 178.

IN THE COURT OF APPEAL [1]

ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Friday the 13th day of April 1923.

ENGLAND.—Upon reading the affidavit of Art O'Brien and the several exhibits therein referred to it is ordered that Monday the 23rd day of April instant be given to His Majesty's Secretary of State for Home Affairs to show cause why a writ of habeas corpus should not issue directed to him to have the body of Art O'Brien immediately before this Court at the Royal Courts of Justice London to undergo and receive all and singular such matters and things as this Court shall then and there consider of concerning him in this behalf.

Upon notice of this order to be given to His Majesty's Secretary of State for Home Affairs in the meantime.

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION (ENGLAND)

Wednesday the 9th day of May 1923.

Upon reading the affidavit of the Right Honourable William Clive Bridgeman and upon hearing Mr. Attorney-General of Counsel for His Majesty's Secretary of State for Home Affairs and Mr. Hastings of Counsel for Art O'Brien it is ordered that a writ of habeas corpus do issue directed to His Majesty's Secretary of State for Home Affairs commanding him to have the body of Art O'Brien immediately before this Court at the Royal Courts of Justice London to undergo and receive all and singular such matters and things as this Court shall then and there consider of concerning him in this behalf And it is ordered that the said Secretary of State for Home Affairs be allowed until the 16th day of May instant within which to make his return to the said writ.

With liberty to apply,
BY THE COURT.

Successive Applications for Writ.

It has been confirmed in a curious case which came before the Judicial Committee of the Privy Council from the West Coast of Africa, *Eshugbayi Eleko* v. *Government of Nigeria*, [1928] A.C. 459, that successive applications for the writ to be issued may be made by an applicant to every court or judge having jurisdiction to hear applications. In this case a tribal chieftain, whose deportation had been

[1] The Divisional Court refused the writ ; hence the appeal, which was not treated as being in a criminal cause or matter (see p. 313, *post*).

ordered, sought to apply for the writ to one judge after another of the High Court of Nigeria, and the Privy Council upheld his right so to apply. Moreover, on each application, the case has to be decided on its merits. This illustrates the important constitutional safeguard that the writ of habeas corpus affords. An applicant may thus, by way of renewed application, take his case before every judge of the High Court of Justice, until he has exhausted all the available judges, but not, except by way of appeal, to the Court of Appeal: *In re Carroll*, [1931] 1 K.B. 104. He may appeal from a decision of the High Court, or of a judge thereof, refusing the issue of the writ, or discharge under the writ, to the Court of Appeal, and thence to the House of Lords: *ex parte Woodhall* (1888), 20 Q.B.D. 832; *cf. Re Clifford and O'Sullivan*, [1921] 2 A.C. 570. If the matter is one the direct outcome of which may be the trial of the applicant and his possible punishment for an illegal offence by a court claiming jurisdiction in that regard, the matter is a criminal cause and there is no appeal, since the Court of Appeal has only a civil jurisdiction: *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147, where a Netherlands subject who was liable to be charged with an offence against the military law of his country was held not to be entitled to appeal against a refusal of the writ. It has been held that no appeal lies to the Court of Appeal in the case of a person for whose deportation application has been made under the Fugitive Offenders Act, 1881, and who applies unsuccessfully for the issue of the writ in the King's Bench Division: *The King* v. *Governor of Brixton Prison, ex parte Savarkar*, [1910] 2 K.B. 1056. This ruling is also applicable to a person whose extradition has been ordered.

Effect of Writ.

If any court has ordered the release of the applicant from custody after hearing the merits of the case,[1] there is no appeal from the order of that court available to the respondent, *i.e.* the person who is ordered to obey the writ by discharging the prisoner, and this is so whether the person detained in custody has actually been released under the order or is still detained: *Cox* v. *Hakes* (1890), 15 App. Cas. 506; *Secretary of State* v. *O'Brien* (*ante*). An appeal by the respondent will, however, lie in those cases where habeas corpus proceedings are employed as a means of determining which of two or more persons has the right to the custody of a child: *Barnardo* v. *McHugh*, [1891] A.C. 388. Disobedience to the writ is punishable by fine or imprisonment for contempt of court, and the offender may be exposed to heavy penalties recoverable by the person

[1] A release from detention on the ground that the prerequisites of lawful detention under Defence Regulations had not been complied with was no bar to a subsequent valid order for detention: *The King* v. *Home Secretary, ex parte Budd*, [1942] 2 K.B. 14.

injured. Not only is the writ used against governors of prisons to prevent a prisoner being detained in custody without trial, but by this means a wife may question the legality of her husband's detention of herself, or parents may establish that a child is detained in an institution, such as an orphanage or rescue home, contrary to their wishes: *Barnardo* v. *Ford*, [1892] A.C. 326.

Habeas Corpus Acts.

The writ of habeas corpus is of common law origin; it was guaranteed to the subject against the King and his Council (the Executive) by an Act of 1640 (16 Car. 1, c. 10, s. 8), which reversed the law as applied in *Darnel's Case* (*The Five Knights' Case*)[1] (1627), 3 St. Tr. 1, and confirmed the Petition of Right, 1628. The Habeas Corpus Acts, 1679, 1816 and 1862, made the writ more effective by improving procedure and checking devices for evasion. The Act of 1679 imposed severe penalties for sending a prisoner outside the realm for the purpose of evading the writ. At one time a common practice of evasion was the transfer of a prisoner from one prison to another. The writ was made peremptory, thus rendering transfers more difficult. The Act also made the writ issuable in vacation, and imposed a severe penalty of £500, which is recoverable by the party injured, on any judge who refuses the writ during vacation. It did not, however, check the evil of a judge or magistrate requiring excessive bail as a condition of release; hence the somewhat vague clause in the Bill of Rights, 1689, which declared that "excessive bail ought not to be required." The Habeas Corpus Act of 1816 extended the statutory procedure to civil imprisonment since the 1679 Act related only to imprisonment on alleged criminal charges. The Act of 1816 also permitted the court in cases where there was no criminal charge to examine the truth of the causes of detention stated in the respondent's return to the writ. Where there is a criminal charge, such examination is not necessary in view of provisions ensuring either speedy trial or release.[2] The Habeas Corpus Act, 1862, precluded the writ from issuing to any colony[3] in which there is a court with authority to grant and issue the writ and with power to ensure its execution in the colony. Apart from this limitation the writ may be enforced in any part of the overseas possessions of the Crown.

Double Purpose of Writ.

The writ of habeas corpus protects the citizen in two ways from an arbitrary Executive. If the cause of detention shown to the court is insufficient, the prisoner must be discharged forthwith; but even if the cause is sufficient, by means of the writ the prisoner can secure a speedy trial and so prevent the Executive from detaining for as long as is considered expedient. In the case of

[1] P. 125, *ante*.

[2] See *Greene* v. *Secretary of State for Home Affairs*, [1942] A.C. 284, *per* Lord Maugham, at pp. 290–95.

[3] Including those colonies which are now Dominions.

treason or felony a prisoner must be released on bail, if he is not indicted at the next Assizes after his committal, unless the witnesses for the Crown cannot appear. If he is not indicted and tried at the next subsequent Assizes, he must be discharged. The Assizes Relief Act, 1889, ensured the speedy trial of all persons committed to Quarter Sessions, whether charged with felony or misdemeanour. Curiously there is no similar provision in respect of misdemeanants committed to Assizes.

Bail. Bail may be granted either by justices or by the King's Bench Division. Justices who refuse bail must inform a person upon committal for trial charged with a misdemeanour of his right to apply to the King's Bench Division : Criminal Justice Administration Act, 1914, s. 23.[1] The High Court has discretion to refuse bail even in cases of misdemeanour.[2] Before a person is committed for trial, the justices conducting the preliminary investigations have discretion as to bail in case of both alleged felony and misdemeanour, and the High Court will be slow to interfere with this discretion.

Dicey: Views on Habeas Corpus. The net result of the habeas corpus procedure is that " while the Habeas Corpus Act is in force, no person committed to prison on a charge of crime can be kept long in confinement, for he has the legal means of insisting upon either being let out upon bail, or else of being brought to speedy trial." [3]

B.

Enjoyment of Property Rights.

Duties of Property Owners. The right freely to enjoy property is conditioned by the obligation which the law imposes upon the property owner. The common law recognised obligations to neighbours and others and these have been supplemented by statutory duties relating to the use of land and other forms of property. This section is principally concerned with the rights and duties of owners of land. Parliament has, however, both by public and local Acts, sanctioned the principle of compulsory acquisition on terms of compensation. Thus an owner of land may be compelled to suffer its acquisition by another, whether it be by a railway company, a local authority or even the State itself. A discussion of freedom of enjoyment of property is therefore bound to take account of the processes whereby the owner may be compelled to exchange his right freely to enjoy his land for a sum of

[1] An application for bail made to a Judge in Chambers by an unconvicted person who has been refused bail after committal is *de novo* and not by way of appeal ; *Ex parte Blyth*, [1944] K.B., 532 ; *In re Lyttleton*, [1945]. W.N. 24.

[2] *The King* v. *Phillips* (1922), 38 T.L.R. 897.

[3] Dicey, *op. cit.*, p. 218.

money representing the value of that right on a scale calculated by statutory standards.

Ordinary Remedies.

The old writ of trespass and its extensions by means of actions on the case provided the common law with the means of resisting invasion of proprietary rights. Trespass to land and conversion of goods are civil wrongs and, if malicious injury be inflicted, are also statutory criminal offences.

Compulsory Purchase of Land.

Property may, however, be compulsorily acquired for public purposes where a statute so authorises. Without statutory authority the Central Government has no power to acquire land except by agreement with the owner, while a local authority requires statutory authority even for acquisition by agreement. Powers of compulsory purchase may be given either by an Act of Parliament authorising the acquisition of specific property for a specific purpose or by orders made under an Act conferring general powers to be exercised for purposes and under conditions laid down in the Act. In the latter case land can be acquired by a public utility undertaking (statutory undertaker) or a local authority on an order made by a Minister, or sometimes under a scheme confirmed by him. Under older Acts the order is usually subject to express confirmation by Parliament, but under modern Acts the confirmation by the Minister may be final or subject only to annulment by Parliament, a step which is rarely taken.

Compensation.

Where a statute authorises the compulsory acquisition of property, it is the invariable practice to provide for the payment of compensation. It is an established rule of construction that express words are required to authorise the taking of property without payment: *Newcastle Breweries* v. *The King*, [1920] 1 K.B. 854.[1] A code governing the procedure for compulsory acquisition and the payment of compensation is contained in the Lands Clauses Acts (Lands Clauses Consolidation Act, 1845, and subsequent amending Acts). These Acts [2] are, unless expressly excluded or varied, automatically included in all Acts which authorise the compulsory acquisition of land, but where land is acquired by a government department, local authority or non-profit-making public body compensation is, unless a statute otherwise provides, assessed not under the Lands Clauses Acts, but on a less favourable basis to owners under the Acquisition of Land (Assessment of Compensation) Act, 1919. A statute may provide for a different basis of compensation, *e.g.* under the Housing Act, 1936, s. 40, the owner of property acquired for slum clearance purposes is in general

[1] The decision, though not the principle mentioned, was disapproved in *Hudson Bay Co.* v. *Maclay* (1920), 36 T.L.R. 469, at p. 478, and *Robinson* v. *The King*, [1921] 3 K.B. 183, at p. 197.

[2] Other codes regulate acquisition for particular purposes, *e.g.* Railways Clauses Consolidation Act, 1845; Waterworks Clauses Act, 1847; Towns Improvement Act, 1847, and various Military Lands Acts.

only compensated to the extent of the site value of his property and not in respect of houses to be demolished thereon. Under the Acquisition of Land (Assessment of Compensation) Act, 1919, compensation is normally assessed by an official arbitrator chosen from a panel appointed by a reference committee.

Defence.

Under the prerogative there is power to deprive the subject of possession of his property for the defence of the realm in time of danger: *Attorney-General* v. *De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508. The various precedents extending back to the seventeenth century point to a usage of payment, but Lord Dunedin, in the case cited, did not consider that such usage imposed an obligation upon the Crown to pay compensation. There are permanent Acts which govern the acquisition or requisition [1] of land for defence purposes (Defence Acts, 1842 to 1873), and under these Acts compensation is payable. During both the First and Second World Wars additional powers were taken. The Defence of the Realm Act, 1914, provided for the suspension by regulation of any restrictions on the acquisition of land contained in the Defence Acts, though the Crown was not thereby relieved of the obligation to pay compensation (*De Keyser's Hotel Case*, *ante*). The specific purposes for which regulations could be made under the Emergency Powers (Defence) Act, 1939,[2] included (*a*) the taking possession or control on behalf of His Majesty of any property, (*b*) the acquisition on behalf of His Majesty of any property other than land. The Emergency Powers (Defence) Act, 1940, authorised the making of regulations requiring persons to place their property at the disposal of His Majesty. No regulations were, however, made under this Act authorising the acquisition as distinct from the requisition of land.[3] The assessment of compensation for the acquisition or use of property during the Second World War is regulated by the Compensation (Defence) Act, 1939.[4] During the First World War it was held (in *De Keyser's Hotel Case*, *ante*) that the Crown could not compel an owner of requisitioned property to accept a rent assessed on an *ex gratia* basis by a non-statutory tribunal, the Defence of the Realm Losses Commission. Under the Act of 1939 two tribunals were established—a General Claims Tribunal and a Shipping Claims Tribunal. The former consists of seven persons (including a High Court judge) appointed by the Lord Chancellor,

[1] Requisition, as opposed to acquisition, implies temporary occupation.

[2] P. 322, *ante*.

[3] The acquisition by the Crown of land requisitioned for war purposes is governed by the Requisitioned Land and War Works Act, 1945.

[4] This Act affords a good example of administrative quasi-legislation (p. 296, *ante*). The Act excludes fair wear and tear from the Crown's liability to make good damage done. The Treasury has ruled that fair wear and tear may be taken into account. It may be suggested that the proper course would have been to amend the Act by deleting the exclusion. As it is, the subject has no right enforceable by law to claim for fair wear and tear.

a judge of the Court of Session and a judge of the High Court of Justice in Northern Ireland. The Shipping Claims Tribunal consists of three members appointed by the Lord Chancellor; two are lawyers with special knowledge of commercial and admiralty law; one is a person having special qualifications as an average adjuster or accountant. Both tribunals may be compelled by the High Court to state a special case for the opinion of the court on a point of law.

Injurious Affection and Betterment.

Land may be injuriously affected by a public undertaking, *e.g.* by the destruction of an easement such as the right to light. Where a statute authorises the doing of an act otherwise illegal,[1] it usually provides for the payment of compensation either under the Land Clauses Acts or on some other basis. Against such compensation there must be set off any betterment arising from the undertaking. The Town and Country Planning Acts, 1932 and 1944, give wide powers to local planning authorities to regulate development so that whole areas may be planned on regulated lines. They contain elaborate provisions for the assessment of compensation and, in the case of the Act of 1932, of betterment.

General Restrictions on Use of Property and Freedom of Contract.

Before leaving the subject of enjoyment of property, it is important to note that the above limitations on the right of free enjoyment are confined to cases of deprivation of ownership in the public interest. But the law does not allow a private owner unlimited and unlicensed use of his property. He may not use his land so as to constitute a nuisance either to the public at large or to his neighbour in particular. Adjoining owners are liable for the support of adjacent land, but not buildings thereon, in the absence of a right of support being acquired. There is a liability accruing from the escape of dangerous things. Both as to land and other forms of property there are numbers of statutory restrictions on use, enjoyment and sometimes even on disposition, see *e.g.* Public Health Acts, 1875–1936; Town and Country Planning Acts, 1932–1944; Mines (Working Facilities and Support) Acts, 1923 and 1925; Petroleum Act, 1934. The State has acquired the ownership of mineral rights in coal, but not the power to work those rights by engaging in mining operations; Coal Act, 1938. No building can be erected without approval of the plans by the appropriate authority. The use of many articles, except under licence from the State, is prohibited. Freedom of contract in other spheres is often restricted; employers are required to contribute to the national insurance schemes for the benefit of their employees and also to compensate them for injuries received in the course of employment; landlords to compensate their tenants for improvements. Under war conditions all production and manufacture are under the control of agencies of the Central Government.

[1] P. 259, *ante*.

CHAPTER 2.

EMERGENCY POWERS IN PEACE AND WAR.

A.

Emergency Powers Act, 1920.

PARLIAMENT has sanctioned, by the Emergency Powers Act, 1920, a modified form of rule by regulation in the event of emergency. The power is surrounded by the safeguard of parliamentary control, which distinguishes it from the old claims to legislate independently of Parliament by virtue of necessity. The power is only exercisable when a state of emergency prevails. It is for the Executive to declare such a state, but the circumstances in which it can do so require careful consideration.[1]

State of Emergency

Before it is lawful to declare a state of emergency, action must have been taken or threatened which is calculated to deprive the community, or any substantial portion of it, of the essentials of life by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion. The state of emergency is declared by proclamation, which can only remain in force for one month, though in practice the period may be continued indefinitely by the issue of a new proclamation. The proclamation must be forthwith communicated to Parliament. If Parliament is not sitting, it must be summoned within five days. So long as the proclamation is in force, regulations may be made by Order in Council for securing the essentials of life to the community. Such powers may be conferred on government departments and on the police as may be deemed necessary for the purpose of preserving peace or for securing and regulating the supply and distribution of necessities and maintaining the means of transport. But the regulations must stop short of imposing compulsory military service or industrial conscription, and no regulation may make it an offence for anyone to take part in a strike or peacefully to persuade others to do so. There is no power to alter the existing procedure in criminal cases or to punish by fine or imprisonment without trial, but the regulations may provide for the trial by courts of summary jurisdiction of persons guilty of offences against the regulations, subject to maximum penalties. The regulations must be laid before Parliament and expire after seven days, unless a resolution is passed by both Houses providing for their continuance.

[1] The text of the Act is given in K. & L., pp. 365–67.

So far there has only been one opportunity of considering the effectiveness of this measure,[1] but the occasion was so important, namely, the General Strike and the Coal Strike, 1926, that it may be regarded as having provided an effective means of suppressing internal disorder on a large scale. The Act does not suspend the writ of habeas corpus and expressly prohibits the alteration of any existing procedure in criminal cases or the conferring of any right to punish by fine or imprisonment without trial. The Trade Disputes and Trade Unions Act, 1927, which was passed as a direct result of the General Strike, aimed at preventing a repetition of such an event by making illegal sympathetic strikes or lock-outs, if conducted on a scale calculated to coerce the Government, by persons in trades not affected by any existing dispute. It also, as a result of the experience gained in the 1926 strike, modified the provision of section 2 of the Trade Disputes Act, 1906, in relation to peaceful picketing.

B.

Emergency Powers in Time of War.

It has always been recognised that times of grave national emergency demand the grant of special powers to the Executive. There are times when it would be dangerous to maintain the normal limitations imposed by judicial control. At such times arbitrary arrest and imprisonment are legalised by Act of Parliament. Modern war demanded the abandonment of personal liberty in that the duty of compulsory national service necessarily took away for the time being the right of the individual to choose his occupation. It was not, however, until the present century that conscription, even in time of war, was introduced in Great Britain.

Habeas Corpus Suspension Acts.

In former times it was the practice in times of danger to the State to pass what were popularly known as Habeas Corpus Suspension Acts.[2] These Acts in effect prevented the use of the writ of habeas corpus for the purpose of insisting upon speedy trial or the right to bail in the case of persons charged with treason or other specified offences. They did not suspend generally the use of habeas corpus proceedings and as soon as the period of suspension in relation to particular crimes was passed anyone who for the time being had been denied the assistance of the writ could seek his remedy in the courts by action for false imprisonment or malicious prosecution. Suspension did not legalise illegal arrest; it merely suspended a particular remedy in respect of particular offences. Accordingly it was the practice at the close of the period of suspension to pass an

[1] In time of war far wider powers are needed; see Section B, *post*.
[2] Dicey, *op. cit.*, pp. 229–37.

Indemnity Acts.

Indemnity Act, in order to protect officials concerned from the consequences of any incidental illegal acts which they might have committed under cover of the suspension of the prerogative remedy. During a period of emergency many illegalities may be committed by the Executive in their efforts to deal with a critical situation. The object of suspension was to enable the Government to take steps which, though politically expedient, were, or might be, not strictly legal. An Indemnity Act legalises all such illegalities and so supplements a Suspension Act which may not have given to the Executive all the power that it required.

First World War.

Neither during the First nor Second World Wars was there any direct suspension of habeas corpus. The Defence of the Realm Acts, 1914–15, empowered the Executive to make regulations by Order in Council for securing the public safety or for the defence of the realm. It was held that this general power was wide enough to support a regulation authorising imprisonment without trial: *The King* v. *Halliday, ex parte Zadig*, [1917] A.C. 260; K. & L. 14.

> The House of Lords held that a regulation was valid which authorised the Secretary of State to detain a British subject on the grounds of his hostile origin or association. It was contended on behalf of Zadig, who was a naturalised British subject, that some limitation must be put upon the general words of the statute delegating power to the Executive; that there was no provision for imprisonment without trial, and indeed the Defence of the Realm Act, 1915, had expressly provided for the trial of British subjects in a civil court by a jury; that general words in a statute could not take away the vested right of a subject or alter the fundamental law of the Constitution; that the statute being penal in nature must be strictly construed and that no construction should be adopted which was repugnant to the constitutional tradition of the country. The majority of the court swept aside these arguments and held that on the construction of the Act the Executive had unrestricted powers. Lord Craigmyle (Lord Shaw of Dunfermline as he then was) delivered a dissenting judgment which has been preferred by some; he declined to infer from the delegation of a power to make regulations for public safety and defence that Zadig could be detained without a trial and indeed without being accused of any offence, save that he was of hostile origin or association as defined by the regulation; Parliament had not expressly said in words any one of these things.

A person detained under a valid regulation giving unrestricted power to detain cannot subsequently bring an action for false imprisonment in order to test the merits of his detention. Thus, though habeas corpus proceedings are not suspended, there is a greater infringement of liberty in giving the Executive unrestricted power to detain than in suspending habeas corpus proceedings in respect of particular charges.

Wide, however, as were the powers of the Executive, it was still practicable to challenge a regulation in the courts. Two cases

deserve mention. In *Attorney-General* v. *Wilts United Dairies, Ltd.* (1921), 37 T.L.R. 884; K. & L. 119,[1] an attempt by the Food Controller to impose a charge was held invalid on the ground that the regulation challenged conferred no express power to impose charges upon the subject. Doubt was also expressed whether a regulation conferring such a power would have been within the general power to make regulations for the public safety or the defence of the realm. In *Chester* v. *Bateson*, [1920] 1 K.B. 829; K. & L. 22, there was held invalid a regulation which deprived a citizen of the right of access to the courts. The regulation empowered the Minister of Munitions to declare an area in which munitions were manufactured, stored or transported to be a special area. The effect of such declaration was to prevent any person without the consent of the Minister from taking proceedings for the recovery of possession of, or for the ejectment of a tenant of, any dwelling-house in the area, if a munition worker was living in it and duly paying rent. It was held that Parliament had not deliberately deprived the citizen of resort to the courts and accordingly that a regulation framed to forbid the owner of property access to legal tribunals was invalid, unless it could be shown to be a necessary or even reasonable way of securing the public safety or the defence of the realm.

Despite the wide powers conferred by the Defence of the Realm Acts numerous illegalities were undoubtedly committed and after the War there was passed a wide Indemnity Act, the Indemnity Act, 1920, and a separate Act relating to illegal charges, the War Charges Validity Act, 1925.

Second World War.

The legislators of 1939 took pains to close the gaps left in 1914–15 and specific powers were taken to avoid the effects of all the decisions of the First World War (except *Chester* v. *Bateson*, *ante*), which had restricted the powers of the Executive. No attempt was made to prohibit access to the courts, but the powers given were so wide that such a precaution was unnecessary. The Emergency Powers (Defence) Act, 1939, empowered the making of regulations by Order in Council (Defence Regulations) for five general purposes, the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of any war in which His Majesty might be engaged, and the maintenance of supplies and services essential for the life of the community. There followed a list of particular purposes for which regulations could be made without prejudice to the generality of the five general purposes.[2] These last included a power to try offenders against the regulations by special courts,[3] a power to make provision for the detention of persons by

[1] P. 41, *ante*.
[2] For regulations affecting property, see p. 317, *ante*.
[3] For trial by court-martial and war zone courts, see Part IX., Chap. 3, *post*.

the Secretary of State in the interests of the public safety or the defence of the realm (a tribute to the dissenting judgment of Lord Shaw in *The King* v. *Halliday*, *ante*), and authority to enter and search any premises. The case of *Attorney-General* v. *Wilts United Dairies, Ltd.* (*ante*), was not overlooked and the Treasury was empowered to impose charges in connection with any scheme of control under Defence Regulations. Regulations had to be laid before Parliament " as soon as may be after they were made " and could be annulled by negative resolution within twenty-eight days. Treasury regulations imposing charges required confirmation by an affirmative resolution of the House of Commons. In addition to the Emergency Powers (Defence) Act there were passed within a few weeks of the outbreak of war some sixty temporary Acts most of which suspended or amended provisions of permanent Acts relating to various public services.

Industrial Conscription.

The Emergency Powers (Defence) Act, 1939, expressly forbade the imposition by regulations of any form of compulsory military service or industrial conscription. Compulsory service was imposed by separate National Service Acts.[1] The ban on the imposition by Defence Regulations of industrial conscription was removed by the Emergency Powers (Defence) Act, 1940. This Act enabled Defence Regulations to require persons to place themselves, their services and their property at the disposal of His Majesty as might appear to him to be necessary or expedient for any of the general purposes enumerated in the Act of 1939.[2] Defence Regulation 55 made under the Act of 1939 had provided for the control of industry, but not of the labour employed in industry. Under the Act of 1940 the directions under Defence Regulation 58A provided for the transfer of labour from less essential civil work to work more closely connected with the war effort. Individuals were thereby directed to take up particular employment with a named undertaking. There followed Essential Works Orders restricting discharge or resignation from employment in essential occupations. Control of Engagements Orders provided that engagements of certain specified classes of persons could only be made through the State employment exchanges.

The Courts during the Second World War.

Access to the courts was not barred. The courts could not, however, consider whether a particular regulation was necessary or expedient for the purposes of the Act which authorised it. It was left to His Majesty to make such regulations as appeared *to him* to be necessary or expedient for these purposes: *The King* v. *Comptroller-General of Patents, ex parte Bayer Products*, [1941] 2 K.B. 306,[3] which disapproved the earlier decision in *E. H. Jones*

[1] Part IX., *post*. [2] P. 332, *ante*.
[3] See also *Progressive Supply Co.* v. *Dalton*, [1943], Ch. 54.

(*Machine Tools*), *Ltd.* v. *Farrell and Muirsmith*, [1940] 3 All E.R. 608. The courts could, however, hold an Act to be illegal as being not authorised by the regulation relied upon to justify it. Thus in *John Fowler & Co.* (*Leeds*), *Ltd.* v. *Duncan* (1941), 57 T.L.R. 612, it was held that an order authorising a controller to control financial transactions in connection with an undertaking did not authorise him to direct the undertaking to increase its bank overdraft.

Regulation 18B.

Most relevant of all the Defence Regulations to personal liberty was Regulation 18B. We have seen [1] that Parliament expressly empowered the Executive to make regulations for detention without trial in the interests of public safety or the defence of the realm. Under Regulation 18B the Home Secretary was empowered to detain anyone whom he had reasonable cause to believe came within specified categories of suspects (including persons of hostile origin or association) and that by reason thereof it was necessary to exercise control over him. Facilities were given to persons detained to make objections to an advisory committee appointed by the Home Secretary. The Home Secretary was obliged to report to Parliament monthly the number of persons detained and the number of cases in which he had not followed the advice of the advisory committee. It was open to the subject to challenge detention by application for a writ of habeas corpus, but such applications had little chance of success in view of the decision of the House of Lords in *Liversidge* v. *Anderson*, [1942] A.C. 206.[2] In spite of a powerful dissenting judgment by Lord Atkin the House of Lords took the view that the power to detain could not be controlled by the courts, if only because considerations of security forbade proof of the evidence upon which detention was ordered. The words " had reasonable cause to believe " only meant that the Home Secretary must direct personal attention to the matter. It was sufficient for him to have a belief which in his mind was reasonable. The courts would not enquire into the grounds for his belief, although apparently they might examine positive evidence of *mala fides* or mistaken identity.[3] Stress was laid upon the high position of the Home Secretary and his responsibility to Parliament. Indeed, the House of Lords appeared to go very near to upholding the doctrine of State necessity so decisively rejected in the eighteenth century in *Entick* v. *Carrington*.[4] In another case decided at the same time the House of Lords held that a mistake on the part of the advisory committee, in failing, as was required by the regulation, to give the appellant correct reasons for his detention did not

[1] P. 323, *ante*. [2] P. 253, *ante*.

[3] *Per* Lord Wright, at p. 261, approving the judgment of Tucker, J., in *Stuart* v. *Anderson* [1941] 2 All E.R. 665.

[4] P. 307, *ante*; see " Regulation 18B and Reasonable Cause," by C. K. Allen, 58 *L.Q.R.*, p. 232.

invalidate the detention order: *Greene* v. *Secretary of State for Home Affairs*, [1942] A.C. 284. In only one case did a person who had been detained under the regulation secure his release by means of habeas corpus proceedings. An order was made for the detention of the applicant, Budd, on the ground that he was connected with a fascist organisation. He was wrongfully informed that the order had been made on the ground of his being of hostile association. The Divisional Court ordered his release. His triumph was, however, short-lived, as the Home Secretary made a new order for his detention.[1]

[1] *The King* v. *Home Secretary, ex parte Budd*, [1942] 2 K.B. 14. See also *The Times*, May 28, 1941.

CHAPTER 3.

LIBERTY OF DISCUSSION.

IN this Chapter there will be discussed those aspects of freedom which are particularly associated with democracy. "Without free elections the people cannot make a choice of policies. Without freedom of speech the appeal to reason which is the basis of democracy cannot be made. Without freedom of association electors and elected representatives cannot band themselves into parties for the formulation of common policies and the attainment of common ends." [1]

Free Elections.

As early as the thirteenth century the Statute of Westminster I. of 1275 provided that there shall be no interference with free elections by force of arms, malice or menaces. In modern times the Ballot Act, 1872, provides for secrecy of elections. This Act is the keystone of our electoral law and its provisions are sacrosanct.[2] A series of Corrupt and Illegal Practices Prevention Acts impose penalties on those who attempt to influence elections by bribery, treating, intimidation, excessive expenditure or other practices forbidden by law.[3] Of late years, partly owing to the size of the electorate, partly no doubt owing to the better political education of the public, these Acts have been rarely invoked. Where a candidate has secured election and he or his election agent has committed or acquiesced in corrupt or illegal practices, he may be unseated on a petition which is heard by two judges of the King's Bench Division under the Parliamentary Elections Act, 1868.

Freedom of Association.

An agreement is in general lawful unless it constitutes the crime or tort of conspiracy. A criminal conspiracy is an agreement to do an unlawful act or to do a lawful act by unlawful means. The definition of conspiracy as a civil tort has caused infinite judicial perplexity.[4] The law of conspiracy must be studied in text-books of criminal law[5] and the law of torts.[6] There should be studied also the law relating to industrial disputes,[5] particularly the Trade

[1] W. I. Jennings, *Cabinet Government* (Cambridge University Press), p. 13.

[2] Nevertheless some slight modification was necessary in order to give members of the forces, seamen and war workers abroad the right to vote both by post and by proxy at a general election held under war conditions; Representation of the People Act, 1945, Part IV.

[3] The law relating to Elections may be studied in Parker, *Election Agent and Returning Officer*, 4th Ed. (Chas. Knight & Co. Ltd.).

[4] See *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*, [1942] A.C. 435.

[5] *E.g.* Kenny, *op. cit.*, Chap. XVIII.

[6] *E.g.* Winfield, *Text-book of the Law of Tort*, Chap. XVII.

Disputes and Trade Unions Act, 1927.[1] The Public Order Act, 1936, s. 2 (1),[2] makes it an offence to take part in the control or management of any association of persons organised or trained and equipped (*a*) for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown, or (*b*) for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object, or in such manner as to cause reasonable apprehension that they are organised and either trained or equipped for that purpose. The same Act, section 1 (1), forbids the wearing without police permission [3] in any public place or at a public meeting of uniform signifying association with a political association or the promotion of a political object.

Freedom of Speech.

The attitude of English law towards freedom of discussion is that a speaker or writer has no special protection to enable him to give free expression to his opinions, but that there is no restriction which can interfere with this freedom, unless he oversteps the bounds set by law, and, in particular, by the law of defamation. The law throws the risk on the speaker, writer and publisher.

Law of Defamation.

The law of defamation is divided into slander, *i.e.* defamation in a transitory form, by word or gesture, and libel, *i.e.* defamation in a permanent form, such as the printed word. Without embarking on a technical discussion of this branch of law it may be said that there can be no defamation, so far as liability for damages in a civil action is concerned, unless the defamatory matter be published to a third person, but there may be criminal liability, even if the words are only published to the person defamed. The basis of liability in the latter case rests on the probability of a breach of the peace. Generally speaking, there is no remedy to restrain in advance the publication of alleged defamatory matter. The ordinary remedy is an action for damages, coupled, if necessary, with an injunction to restrain further publication.

Privilege.

Some occasions are privileged and then there is no liability for defamation. Privilege is of two kinds, (*a*) absolute, (*b*) qualified. Qualified privilege may be rebutted on proof of malice. Examples of communications which are absolutely privileged are statements made in the course of judicial [4] or parliamentary proceedings,[5] communications between a Minister of the Crown and the Crown or another Minister, military reports, communications between solicitor and client, and documents published by authority of

[1] P. 320, *ante*.
[2] The text is given in Dicey, *op. cit.*, p. 635.
[3] *Cf.* the power of the police to prevent a public meeting on the ground that it is likely to lead to a breach of the peace (p. 332, *post*). It is unsatisfactory that the legality of an act should depend upon police permission.
[4] P. 216, *ante*. [5] P. 110, *ante*.

Parliament.[1] Qualified privilege attaches to, *e.g.*, communications made in pursuance of a legal, social or moral duty to a person who has an interest in receiving the communication.[2]

The Press

The Press may be said to be in much the same position as the ordinary individual. At one time under the Licensing Act, 1662, printing was a monopoly and was only permitted under licence. But since 1695, when the Act was not renewed, the liberty of the Press has consisted in printing without licence, subject to the consequences of the ordinary law. It is not surprising that the Press figures largely in the cases relating to the law of defamation. There are, however, a number of enactments which give the Press some not unimportant advantages.[3]

Special Defence open to Press.

The defence of apology is only available in an action for libel contained in a public newspaper or other periodical publication; the defendant must prove (1) that the libel was published without actual malice and without gross negligence, and (2) that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or publication a full apology for the libel. (3) Moreover, there must be a payment made into court by way of amends, which precludes any other defence denying liability being pleaded: Libel Act, 1843.

Press Reports.

Qualified privilege attaches to reports in newspapers of public meetings and to unofficial reports of parliamentary debates and judicial proceedings whether or not they are published in a newspaper. Reports of proceedings in courts of justice must be fair and accurate, not prohibited by order of the court, and not blasphemous, seditious or immoral. Such reports are also subject to the provisions of the Judicial Proceedings (Regulations of Reports) Act, 1926, which prohibits the publication of indecent matter, and in the case of reports in newspapers of matrimonial cases, restricts what may lawfully be published to a bare summary of the names of the parties, their legal advisers, the witnesses, a statement of the matter at issue, submissions, together with the decision thereon, on points of law, and the judgment. Reports of parliamentary proceedings are only privileged if they are fair and accurate. In order to secure privilege the reports of proceedings of a public meeting must be fair, accurate, and contemporaneous, containing no blasphemous or indecent matter, and the publication must be for the public benefit or relate to a matter of public concern. This privilege may be rebutted on the ground that the defendant has refused to insert in the newspaper a reasonable letter or statement by way of contradiction or explanation. In connection with criminal libels the Press enjoys some protection, and in particular an order of a judge of the

[1] P. 112, *ante*. [2] Winfield, *op. cit.*, Chap. XVII.
[3] For fuller discussion, see Dicey, *op. cit.*, Appendix, Section II. B.

High Court is required before a newspaper can be prosecuted for criminal libel.

No Special Law of Press.

But it cannot be said that these defences amount to a special law for the Press, especially when it is noticed that any defendant in an action for defamation can plead as his defence honest and fair comment on the facts of a matter of public interest. Nowadays offences by the Press are tried in the ordinary civil and criminal courts, and the State is content to leave the public expression of opinion to the working of the ordinary law, subject only to the censorship of stage plays by the Lord Chamberlain, and the regulation under the Act of 1926 of certain types of judicial reports.

Sedition and other Offences.

The criminal law of blasphemy and obscenity is a further restriction, in the interests of the public, on the liberty of a man to say what he likes.[1] Moreover, the State retains in its armoury certain little-used weapons to deal with offences against itself. It is a misdemeanour to publish words or documents with seditious intent. The definition of sedition [2] is wide enough to cover almost every act of disaffection or disloyalty whether to the State or Church, but prosecutions for seditious offences are rare and juries are unwilling to convict for the expression of opinion relating to public affairs.

Official Secrets Acts.

The Official Secrets Acts, 1911 to 1939, confer drastic powers which are capable of being used to prevent the Press and its contributors from commenting upon affairs of public interest. In addition to conferring wide powers of search upon suspicion [3] the Acts make it an offence to communicate to any person (other than a person to whom communication has been authorised) any information entrusted in confidence by any person holding office under the Crown. The information need not relate to any matter of national importance and its truth or public interest is immaterial. Thus it would be an offence to reproduce in a newspaper information relating to a crime given in confidence by a police officer to a reporter. It is also an offence (Official Secrets Act, 1920, s. 6) to refuse on demand by a police officer not below the rank of inspector to disclose the source of information. This power of interrogation may, however, only be used with the permission of the Secretary of State and only in respect of espionage and similar serious offences.[4] The purpose of the Acts is to prevent the safety of the State being prejudiced by communication to potential enemies and the risk of abuse of powers is minimised by the requirement that the consent of the Attorney-General is required before a prosecution is brought under the Acts.

[1] Dicey, *op. cit.*, Appendix, Section II. B.
[2] *The King* v. *Aldred* (1909), 22 Cox 1 ; Dicey, *op. cit.*, p. 579.
[3] P. 309, *ante*.
[4] Official Secrets Act, 1939, passed as the result of the decision in *Lewis* v. *Cattle*, [1938] 2 K.B. 454.

Seduction from Duty.

The Incitement to Mutiny Act, 1797, and the Incitement to Disaffection Act, 1934, are aimed at preventing the seduction, by whatever means, of the armed forces from their duty or allegiance.[1] Under the latter Act it is an offence for any person with intent to commit or to aid, counsel or procure the offence of seducing a member of the armed forces from his duty or allegiance, to have in his possession or under his control any document of such a nature that the dissemination of copies thereof among His Majesty's forces would constitute the promotion of disaffection. The measure goes a long way to arming the Executive with a weapon to restrict the distribution of political propaganda and of pacifist literature in particular.

Contempt of Court.

Both Parliament and the courts have power to punish criticism which they regard as unwarranted by committal for contempt.[2] Criminal contempt of court takes two forms : (*a*) *conduct by strangers or parties to a suit which scandalises the court.* A court of record may fine or commit to prison for contempt any person who uses threatening words or abuses any judge of the court. It is, of course, permissible to discuss the merits of a judgment or sentence, but the court has power to punish any criticism which it regards as mere invective or as tending to bring into ridicule and contempt the administration of justice ; [3] (*b*) *conduct which is calculated to prejudice a pending proceeding.* The offence is not confined to criminal proceedings, but committal for this form of contempt of court is mainly used to prevent comments which might influence a jury about to try a criminal offence. The applicant must show that something has been published which is intended or calculated to prejudice a pending trial.[4] The value of this protection is greatly diminished by the lawful practice of publishing the proceedings before magistrates prior to committal for trial.

Freedom of Speech in Time of War.

During the Second World War additional powers were taken by Defence Regulations to control propaganda. Defence Regulation 39B made it an offence to make use of any false statement, document or report to influence public opinion in a manner likely to be prejudicial to the defence of the realm or the efficient prosecution of the war. The regulation as originally made applied not only to false statements, but might also have been used to penalise honest criticisms of the Government. It was replaced early in the war

[1] Publications calculated to cause disaffection among the police are prohibited by the Police Act, 1919, s. 3, which makes it an offence to cause disaffection among the police or to induce any member of a police force to commit a breach of discipline.

[2] For committal for contempt by Parliament, see p. 113, *ante*.

[3] See *The King* v. *Editor of New Statesman* (1928), 44 T.L.R. 301 ; *Ambard* v. *Attorney-General for Trinidad and Tobago*, [1936] A.C. 322 ; Dicey, *op. cit.*, Appendix. Section II. (2) C.

[4] *The Queen* v. *Payne and Cooper*, [1896] 1 Q.B. 577.

and the new regulation was limited as a result of parliamentary criticism to penalising false statements. Defence Regulation 39A provided power to deal summarily with persons endeavouring to seduce from their duty or cause disaffection likely to lead to a breach of duty among persons in His Majesty's service or employed by a public authority in connection with the public service or defence of the realm.

The Press.

Defence Regulation 39B as originally made, also enabled a compulsory censorship of the Press to be established, but a few weeks later it was restricted to the control of the publication of matter prejudicial to our relations with foreign countries or relating to transactions in the course of negotiation between the Government and persons abroad. This concession left the Press free to use its own discretion as to the publication of other matter, subject to the risk of prosecution if it published matter prejudicial to security. Defence Regulation 2D, which was added to the Code in 1940, gave power to suppress a newspaper without previous warning on the ground that it was systematically publishing matter calculated to ferment opposition to the prosecution of the war. The regulation was used in 1941 to suspend *The Daily Worker*, and in 1942 *The Daily Mirror* was threatened with suspension as the result of the publication of a cartoon and other material calculated to cause unrest in the armed forces and the merchant navy.

Public Meeting.[1]

The right to hold a public meeting or procession is akin to, but separate from the right of free speech. There must be considered (*a*) the place where the meeting or procession is to be held, (*b*) the risk of disorder arising from it.

The Public Highway.

"The right of free speech is a perfectly separate thing from the question of the place where it is to be exercised." [2] In regard to use of the public highway a distinction must theoretically be drawn between meetings and processions.[3] The citizen's right to use the highway is a right of passing and re-passing,[4] not of standing still. A procession is *prima facie* lawful, but the use of the highway must be reasonable. A meeting on the highway is *prima facie* unlawful being a trespass against the body or person in whom the surface is vested, which in urban areas means the local authority. In practice there is little difference. It is an offence to obstruct the passage of any footway or other highway, nor is it a defence to show that the

[1] The law on this very complicated topic is fully discussed in Dicey, *op. cit.*, Appendix, Section II. (1). Here only a brief and dogmatic statement of the law is attempted.

[2] *McAra* v. *Magistrates of Edinburgh*, [1913] S.C. 1059, at p. 1073.

[3] See "Public Meetings and Processions," by A. L. Goodhart, 6 *C.L.J.*, p. 161.

[4] *Harrison* v. *Duke of Rutland*, [1893] 1 Q.B. 142; *Hickman* v. *Maisey*, 1900] 1 Q.B. 752.

obstruction only affected part of the highway and left clear a right of passage; Highway Act, 1835, s. 72: *Homer* v. *Cadman* (1886), 16 Cox 420. A procession, just as a meeting, may cause an obstruction. Indeed, as has been pointed out,[1] it is difficult to imagine a procession which is not also an obstruction. So far, therefore, as the place of assembly is concerned, it would seem that a public meeting is only lawful in private premises with the consent of the owner or in a public open space or in a park where there is no right of way to be obstructed, and then only with the consent of the local authority in whom the open space or park is vested.[2]

Power to Prohibit Processions.

The Public Order Act, 1936, s. 3, empowers a chief officer of police who has reasonable ground for apprehension that a procession may cause serious public disorder to give directions necessary for preserving public order and to prescribe the route to be taken and to prohibit the procession from entering any specified public place. Moreover the Commissioner of the Metropolitan Police (or of the City of London Police), with the consent of the Home Secretary, and in other urban areas the local authority on the application of the chief of police and with the consent of the Home Secretary, may prohibit for a period not exceeding three months the holding of any public procession in a police area or any part thereof.

Risk of Disorder.

Apart from the question of the place of assembly there must be considered the risk of disorder arising from public meetings. Where those who take part in a meeting are themselves disorderly the law is comparatively simple. The position is difficult when otherwise lawful conduct excites or is likely to excite others to be disorderly. The common law relating to public meetings and processions reveals a conflict between two principles, (*a*) an act does not become unlawful because doing it may cause another to do an unlawful act, *e.g.* it is not unlawful for A to advocate birth control because B's dislike of it will cause B to assault A, (*b*) a magistrate or police officer is under a duty to take any steps that are necessary to prevent a breach of the peace which he reasonably apprehends. The second principle appears to have prevailed,[3] so far as police power to prevent the holding of a meeting is concerned: *Duncan* v. *Jones*, [1936] 1 K.B. 218.[4]

> Mrs. Duncan, a woman speaker, was forbidden on her arrival by Jones, a police officer, to hold a meeting at a place opposite a training centre for the unemployed. Fourteen months previously Mrs. Duncan had held a meeting at the same spot which had been followed by a disturbance in the centre attributed by the

[1] Jennings, *The Law and the Constitution*, 3rd ed., p. 254.
[2] *Ibid.* [3] See, however, p. 334, *post.*
[4] For discussion of this case, see Dicey, *op. cit.*, pp. 557–60.

superintendent of the centre to the meeting. Mrs. Duncan mounted a box to start the meeting but was taken into custody and charged under the Prevention of Crimes Acts, 1871 and 1885, with obstructing a police officer in the execution of his duty. There was no allegation of obstruction of the highway or of inciting or provoking any person to commit a breach of the peace. Quarter Sessions found (*a*) that Mrs. Duncan must have known of the probable consequences of her holding the meeting, viz. a disturbance and possibly a breach of the peace, and was not unwilling that such consequences should ensue, (*b*) that Jones reasonably apprehended a breach of the peace, (*c*) that in law it therefore became his duty to prevent the holding of the meeting, (*d*) that by attempting to hold the meeting Mrs. Duncan obstructed Jones when in the execution of his duty; and on appeal to the Divisional Court it was held that Mrs. Duncan had been rightly convicted.

If this decision is correct, it would seem that the common law no longer protects the right of public meeting.[1]

In *Thomas* v. *Sawkins*,[2] [1935] 2 K.B. 249, it was held that the police may attend a public meeting held in private premises if they reasonably suspect that a breach of the peace will occur or that seditious speeches will be made,[3] and need not withdraw at the request of the promoters of the meeting. Police may attend as members of the public and thus by their presence brand a meeting as one at which a breach of the peace is likely to occur. A magistrate too has a duty to preserve the peace and may disperse a meeting if he reasonably believes that so only can the peace be preserved: *O'Kelly* v. *Harvey* (1883), 14 L.R.Ir. 105.[4]

Binding Over.

Magistrates have a wide power to bind over any person to enter into a recognisance (undertaking) with or without sureties to keep the peace or to be of good behaviour (either in general or to a particular person): *Lansbury* v. *Riley*, [1914] 3 K.B. 229. For a breach of such recognisance there may be imposed six months' imprisonment. This power is vaguely defined; it may rest upon a statute of 1360 (34 Edw. 3, c. 1) or may be inherent in the commission of the peace held by magistrates. It appears that it is not necessary to show that there has been anything done calculated to lead to violence: *The King* v. *Sandbach, ex parte Williams*, [1935] 2 K.B. 192; where the offender had despite warnings and previous convictions for obstructing the police repeatedly advised a street bookmaker of the approach of the police and so enabled him to avoid conviction. It was held that a magistrate may properly bind a man over whenever it is

[1] Dicey, *op. cit.*, p. 559.
[2] See also p. 307, *ante*.
[3] Or possibly that any offence will be committed.
[4] Cf. *Humphries* v. *Connor* (1864), 17 Ir. C.L.R. 1, where the removal of an emblem (a technical assault) was held justified in order to prevent a breach of the peace.

apprehended that he is likely to commit a breach of the peace or do something contrary to law.

Unlawful Conduct at Meetings.

Hitherto consideration has been given primarily to the powers of magistrates and police officers to take steps to prevent disorder before it occurs. We must now consider the penalties for unlawful conduct at meetings. By section 5 of the Public Order Act, 1936, any person is guilty of an offence who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned. Disorderly behaviour for the purpose of preventing the transaction of business at a lawful public meeting is punishable under the Public Meeting Act, 1908, as amended by section 6 of the Public Order Act, 1936. Disorderly conduct at a meeting is also in most urban areas an offence against the provisions of a local Act or by-law.

Unlawful Assembly.

Those participating in a meeting may also be guilty of the common law misdemeanour of unlawful assembly, though the police usually prosecute under the provisions of a by-law. This offence is constituted by the meeting together of three or more persons for the accomplishment of some common design, lawful or unlawful, which is likely to involve violence or to produce in the minds of reasonable persons an apprehension of violence. The mere knowledge that opponents are likely to cause disorder does not, however, turn an otherwise lawful assembly into an unlawful assembly: *Beatty* v. *Gillbanks* (1882), 9 Q.B.D. 308; K. & L. 354. The promoters of a meeting may be guilty of the offence of obstructing the police in the execution of their duty (see *Duncan* v. *Jones*)[1] and yet not necessarily be guilty of the offence of unlawful assembly. The distinction may be important. A civilian, and equally a soldier,[2] has a common law duty to take all necessary steps to disperse an unlawful assembly. He is not, however, obliged to take steps to disperse a meeting merely because a police officer has, in the exercise of his duty to prevent a breach of the peace, forbidden the meeting to take place.

The Seditious Meetings Act, 1817, s, 23, makes meetings of more than fifty persons unlawful assemblies if held within one mile of Westminster Hall, if either House of Parliament is sitting.

Riot.

Riot at common law is a misdemeanour punishable with imprisonment. The elements essential to constitute a common law riot are five in number: (1) the presence of not less than three persons, (2) a common purpose, (3) execution or attempted execution of the common purpose, (4) an intent to help one another, by force if necessary, against anyone who may oppose them in the execution of the common purpose, (5) force or violence displayed

[1] Pp. 332–3, *ante*. [2] P. 336, *post*.

in such manner as to alarm at least one person of reasonable firmness: *Field* v. *Receiver of the Metropolitan Police*, [1907] 2 K.B. 853. If the unlawful purpose upon which the rioters are engaged is itself felonious, *e.g.* arson, then the riot is a felony at common law. The distinction may be important because more force may be justified in order to suppress a felony than to suppress a misdemeanour.

Statutory Riot also a Felony.

A riot may also become felonious under the provisions of the Riot Act, 1714, quite apart from the actual commission of, or intention to commit, an independent felony which, as has been seen above, is sufficient to constitute the riot felonious. By the provisions of this Act a magistrate is empowered to order any twelve or more persons who are assembled together to the disturbance of the public peace to disperse within one hour after the reading of the proclamation in the Act. Failure to comply with the proclamation within the hour renders the rioters liable to be adjudged felons and punished with the maximum penalty of penal servitude for life.

Damage done by Rioters.

Formerly compensation for damage done to property by rioters was payable by the Hundred, an ancient division of a county. The Riot (Damages) Act, 1886, entitles property owners to recover compensation out of the county or borough funds (police expenses), thus throwing the burden on to the general body of the ratepayers. In a claim for compensation under this Act it was held that acts which constitute a riot when committed by civilians equally constitute a riot when committed by soldiers, notwithstanding that the acts may take place at a military camp in England during time of war: *Pitchers* v. *Surrey County Council*, [1923] 2 K.B. 57.

Duty to Disperse Unlawful Assemblies and Riots.

It is the duty of every citizen and the special duty of magistrates and police officers to suppress unlawful and disorderly assemblies: *Charge to the Bristol Grand Jury* (1832), 5 C. & P. 261 ; K. & L. 359. A magistrate or police officer must hit the exact line between excess and failure of duty and is guilty of criminal neglect if he fails to judge rightly: *The King* v. *Pinney* (1832), 5 C. & P. 254.[1] Soldiers have the same duty as other citizens to suppress riots, but it is desirable that they, like civilians, should act in subordination to a magistrate and that an officer in charge of troops should not order recourse to arms on his own initiative, unless the danger is pressing and immediate.[2]

[1] It is not the practice to prosecute a private citizen for failure to take action on his own initiative.

[2] See also p. 352, *post*.

PART IX.

THE ROYAL FORCES.

MILITARY AND MARTIAL LAW.

Manual of Military Law, Chapter IX. (History of the Forces).
Chapter II. (History of Military Law).

Law of the Constitution by A. V. Dicey, 9th ed., Part II., Chaps. VIII. and IX. and Appendix, Section V.

CHAPTER 1.

THE FORCES OF THE CROWN.

Introductory.

IN this Part there will be considered the composition and discipline of the armed forces, the nature of military law and the status of those who are subject to it. There will also be considered those special common law powers which may be exercised by the Executive and by military commanders in a time of major emergency. When an emergency arises or is foreseen, statutory powers are normally taken to enable the Executive to meet it, but the common law powers remain.[1] The common law imposes upon every citizen (and the soldier is first a citizen and secondly a soldier) the duty to take all necessary steps to resist invasion and suppress insurrections. Those in command of troops are in the best position to deal with invasion or insurrection. In order to fulfil their duty it will be necessary for military commanders to interfere with the liberty of civilians. The imposition of the will of military commanders upon the civil population is often referred to—it is submitted unfortunately—as "martial law." It is convenient to discuss this topic in connection with the armed forces of the Crown.

A.

Composition and Discipline of the Army.

Feudal Levy.

In early times there were two distinct national forces, the Feudal Levy and the National (or Militia) Levy.[2] The Feudal Levy had,

[1] See *H. of C. Deb.*, 5th Series, Vol. 363, col. 90 *et seq.*, and particularly the Attorney-General at col. 137.

[2] See *China Navigation Co.* v. *Attorney-General*, [1932] 2 K.B., at pp. 225 ff.

since in the twelfth century actual service was commuted for a money payment (scutage), ceased to be of importance, though the payment of scutage constituted a burdensome incident of land tenure until it was remitted in 1385. The National Levy was a defensive force, organised by counties, with no liability, save in case of invasion, to serve outside the county. This force, which had its origin in pre-Norman days, was revived and reorganised after the Conquest, and at its head the Sheriff was replaced by the official now known as the Lord-Lieutenant. There was a general liability to military service in this force, though the actual forces of the Crown for war came to be raised by commissions of array, whereby each county supplied a compulsory quota for the King's Army. Strictly speaking, forces so raised could not, apart from invasion, be compelled to serve outside their own counties. These commissions were a frequent ground of complaint in the time of the three Edwards; by them and by other means the Crown strove to acquire a third force (a standing army), which could be employed, as the need for a permanent force began to be recognised, irrespective of the limitations as to time and place which attached to the Feudal and National Levies. The King provided himself with such an army either by voluntary enrolment, by impressment, or by contract, if he could afford to pay it, or if Parliament granted him the necessary funds. How far such a force had a lawful basis in time of peace is doubtful. The Petition of Right, 1628, moreover, furnished a difficulty in maintaining army discipline, because no departure from the ordinary law was henceforth permissible, except on actual service. Commissions of martial law (the law of the Constable and Marshal) were thereby expressly declared illegal, though they were probably illegal apart from this declaration.

National Levy.

Standing Army.

The National Levy, by this time known as the Militia, was reorganised after the Restoration by the Militia Act, 1661. This Act declared that:

The Militia.

> the sole supreme government, command and disposition of the Militia and of all forces by sea and land is, and by the laws of England ever was, the undoubted right of the Crown.

The King was not, however, henceforth permitted to keep a standing army beyond "guards and garrisons" of unspecified numbers. On this footing, with constant disputes between King and Parliament, the matter continued until the Revolution of 1688. The Bill of Rights provided that:

Bill of Rights.

> The raising or keeping of a standing army within the Kingdom in time of peace, unless it be with the consent of Parliament, is against the law.

This provision was due not so much to objection to military service as to the realisation that the army might be dangerous to the liberty of the subject in the hands of an unwise ruler.

Mutiny Acts.

Thus in the absence of enabling legislation a standing army in peace time was (1) unlawful; (2) its discipline could not be enforced by rules differing from the ordinary law; and (3) the supplies necessary for its maintenance were lacking, since the King had no private revenue to meet the expenditure. There was no doubt that a permanent army was required for national security. For a long while the first two legal objections were overcome by a succession of Mutiny Acts, the first of which was passed some time previous to the Bill of Rights in 1689. These Acts served the double purpose of legalising for a fixed period, by convention for one year only, the keeping of permanent land forces by the Crown and of providing a code of rules for enforcing discipline in their ranks. From 1713 to 1879 there was no break in these Acts. In 1879 military law was codified in a single enactment, subsequently replaced by the Army Act, 1881. This code is continued in force from year to year by an annual Act, known formerly as the Army (Annual) Act and now as the Army and Air Force (Annual Act) (instead of the Mutiny Act), the necessity for which still remains, in order to suspend for the time being the unrepealed provision of the Bill of Rights. The preamble to this annual Act expressly fixes the maximum numbers of the land forces, other than those serving within His Majesty's Indian Possessions and in the Royal Marines.[1] The Annual Act from time to time effects amendments to military law as laid down by the Army Act, 1881. The Royal Marines, a force of infantry and artillery, are enrolled and maintained by the Admiralty and only come under the Army Act when they are not serving on board ship; hence their number is not fixed by the Annual Act. A separate Air Force was constituted in 1917 by the Air Force (Constitution) Act of that year. The Army Act, 1881, with modifications governs the discipline of the Air Force and as modified for that purpose is separately printed and known as the Air Force Act.

Army Act, 1881, and the Army and Air Force (Annual) Act.

The preamble of the Annual Act is, in peace time, as follows:

> Whereas the raising or keeping of a standing army within the United Kingdom in time of peace, unless it be with the consent of Parliament, is against law:
>
> And whereas it is adjudged necessary by His Majesty and this present Parliament that a body of land forces should be continued for the safety of the United Kingdom and the defence of the possessions of His Majesty's Crown, and that the whole number of such forces should consist of one hundred and eighty-five thousand

[1] In time of war no maximum is specified, but instead "it is judged necessary that the whole number of such forces should consist of such number as His Majesty may deem necessary."

seven hundred exclusive of the numbers actually serving in India or Burma:

And whereas under the Air Force (Constitution) Act, 1917, His Majesty is entitled to raise and maintain the air force, and it is judged necessary that the whole number of such force should consist of one hundred and eighteen thousand exclusive of the numbers serving as aforesaid:

And whereas it is also judged necessary for the safety of the United Kingdom, and the defence of the possessions of this realm, that a body of Royal Marine forces should be employed in His Majesty's fleet and naval service, under the direction of the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral aforesaid:

And whereas the said marine forces may frequently be quartered or be on shore, or sent to do duty or be on board transport ships or vessels, merchant ships or vessels, or other ships or vessels, or they may be under other circumstances in which they will not be subject to the laws relating to the government of His Majesty's forces by sea:

And whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm; yet, nevertheless, it being requisite, for the retaining all the before-mentioned forces, and other persons subject to military law or to the Air Force Act, in their duty, that an exact discipline be observed and that persons belonging to the said forces who mutiny, or stir up sedition, or desert His Majesty's service, or are guilty of crimes and offences to the prejudice of good order and military or air force discipline, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow:

And whereas the Army Act and the Air Force Act will expire in the year one thousand nine hundred and thirty-seven on the following days:—

(*a*) In Great Britain and Ireland, the Channel Islands, and the Isle of Man, on the thirtieth day of April; and

(*b*) Elsewhere, whether within or without His Majesty's dominions, on the thirty-first day of July:

The operative sections (1) specify the period during which the Army Act and the Air Force Act are to remain in force, (2) apply the Acts to persons subject to military and air force law, (3) fix billeting rates, (4) make any amendments to the Acts.

Since the cost of the forces is met exclusively out of public funds Parliament has a further control through scrutiny of the estimates and the consequent votes of supply each year.

Terms of Service: (*a*) Rank and File.

So far as the rank and file are concerned, members of all the forces have hitherto been recruited by voluntary enlistment [1] for varying fixed periods of service, with liability to serve anywhere within or without the realm. Enlistment, which is accompanied by attestation before a justice of the peace, is in the nature of

[1] For compulsory service in war time, see p. 343, *post*.

a contract between the soldier and the Crown. The Crown cannot vary the terms of enlistment without the soldier's consent, but like any other servant of the Crown a soldier is employed at the pleasure of the Crown; a member of the armed forces cannot sue for pay or pension: *Leaman* v. *The King*, [1920] 3 K.B. 663.[1]

(*b*) Officers. Officers, in all branches of the forces, are appointed by the King's commission. They cannot resign or retire without leave, though they are usually in peace time permitted to retire at their own request: *The Queen* v. *Cuming, ex parte Hall* (1887), 19 Q.B.D. 13. They, too, are liable to be discharged at the pleasure of the Crown.

All ranks of the Regular Army, whilst actively employed, are subject to military law. This liability applies to the soldier whether he is serving at home or overseas, including service in India.

British Army in India. A large part of the British Regular Army is normally employed in India; the number of these troops is excluded from the total authorised by the preamble to the Army and Air Force (Annual) Act. The control of these troops is vested in the Government of India. The Commander-in-Chief in India is always a member of the Governor-General's Council.

Indian Army. The Indian Army is recruited from native sources. The officers and senior n.c.o.s are partly non-Indian British subjects, partly natives of India. Indian military law is promulgated by the Governor-General in Council and it applies to all natives of India who are members of the Indian Army. The non-Indian British officers and n.c.o.s come under the Army Act. Both the Indian Army and the British Army in India are maintained out of Indian revenue so long as they are employed in India. It is doubtful, having regard to the exclusion from the numbers fixed by the Army and Air Force (Annual) Act of both these forces, whether without parliamentary sanction they could be employed outside India in time of peace. In this connection it must be observed that persons subject to military law are not exempt therefrom by reason of the statutory maximum being exceeded.

Dominion Military Forces. Each of the Dominions has its own military and air forces, and they may be classified as regular forces. Their permanent organisation is, broadly speaking, on a skeleton footing, providing for rapid expansion in time of war or other emergency. They are part of the forces of the Crown, but their organisation, discipline and employment are exclusively under the control of their respective Governments. All legislation affecting them is enacted by the Dominion Parliaments. There are also forces raised by certain colonies.

Visiting Forces. The Visiting Forces (British Commonwealth) Act, 1933, empowers

[1] Part VII., Chap. 3, *ante*.

the military and naval authorities of a Dominion to exercise in the United Kingdom all the powers conferred by their own law in relation to the discipline and internal administration of a Dominion force visiting this country. The Act contains provisions enabling the authorities of this country to arrange for the arrest of alleged offenders at the request of the commander of a visiting force and to hand over deserters. During the Second World War similar rights were conferred by the Allied Forces Act, 1940, in respect of forces of allied States stationed in this country. The jurisdiction conferred by these Acts did not exclude the jurisdiction of the courts of this country in respect of offences committed by members of a visiting force, but by the United States of America (Visiting Forces) Act, 1942, exclusive jurisdiction [1] was given to the American authorities in respect of criminal offences committed in this country by members of visiting American forces. This was a striking constitutional innovation made on grounds of political expediency. By the Allied Powers (Maritime Courts) Act, 1941, provision was made for the establishment in the United Kingdom of maritime courts of allied States with jurisdiction over their merchant seamen ; here the jurisdiction was not exclusive of that of our courts.

Reserve and Auxiliary Forces : Army Reserve.

The organisation of the reserve and auxiliary forces will be described, as it was in 1939, with a brief explanation of their incorporation in the regular forces on the outbreak of war. That there may be big changes after the war is possible, but it is not for the lawyer to attempt to forecast what those changes may be.

The reserve and auxiliary forces of the Crown consist as far as the Army is concerned of the Army Reserve, the Militia and the Territorial Army.[2] The Army Reserve consists of former regular soldiers who are liable for a fixed number of years after the expiry of their service to be called up for armed training or to assist the civil power in the prosecution of peace, and for general service in the regular army in the event of war. Officers are also liable to recall until they attain a given age which varies with their rank. One class of the Army Reserve (Section A of Class I.) is liable to be called out on permanent service without the issue of a proclamation, but the main body of the Reserve can only be called out for permanent service by proclamation, and the issue of such a proclamation indicates a state of imminent national danger or grave emergency. If Parliament is sitting, the occasion must first be communicated to Parliament, and if it is not sitting, it must be summoned to meet within ten days.

[1] The American authorities could request the British authorities to prosecute in a British court.

[2] The statutes governing the Army Reserve, Militia and Territorial Army are permanent Acts which have not been repealed since 1939.

The Militia.

The old county force known as the Militia was disbanded in 1908, but since 1921 the term, Militia, has been applied to the Special Reserve created by the Territorial and Reserve Forces Act, 1907. The Militia forms part of the Army Reserve and is a body of reservists who have not served in the regular forces. Up to 1939 it was a force of insignificant numbers.

Territorial Army.

The Territorial Army—the part-time citizen army—which superseded and absorbed the former Volunteers and Yeomanry, is a volunteer force recruited and organised by counties. It was created by the Territorial and Reserve Forces Act, 1907, as part of the Army reforms associated with the name of Lord Haldane. After the issue of a proclamation calling out the Army Reserve the Army Council can issue an order embodying the Territorial Army, which thereupon is put on an active service footing of whole-time service. No part of the Territorial Army can be ordered to serve overseas without its own consent. During armed training or on embodiment a member of the Territorial Army is subject to military law and receives the same pay and allowances of his rank as the regular army. Early in 1939 the Territorial Army was raised to a force of some half a million men and included also the newly raised Women Auxiliaries (A.T.S.). It thus provided at the outbreak of war a far larger defence force than the regular army. It was organised into field and anti-aircraft divisions. The latter (seven in number) were responsible for the whole of the air defence of Great Britain provided by the Anti-Aircraft Command.

Home Guard.

The Home Guard, raised in May 1940, as the Local Defence Volunteers, was part of the armed forces of the Crown. It consisted at first of volunteers and later partly of those enrolled by directions under Defence Regulations. Its members were subject to military law with certain modifications as to discipline. Except when mustered to resist invasion, members of the Home Guard were not required to perform whole-time service or to live away from home, nor might they be required to enrol for a period exceeding the period of "the present emergency." The Force stood down at the end of 1944.

War-time Legislation and Compulsory Service.

In 1939 for the second time in twenty-five years the United Kingdom was forced to adopt a system of compulsory service. Conscription had long been regarded as an evil which should not befall a British subject in time of peace, though historically its abhorrence is based on the fear lest the King should be possessed of too powerful a weapon with which to coerce the people. On the outbreak of war the various reserve and auxiliary forces were absorbed into the regular forces and the statutory provisions relating to length of service, liability to serve overseas and terms of enlistment were all superseded by the introduction of compulsory military service. Earlier, in May 1939, there had been passed the

Military Training Act, 1939, which provided for the compulsory military training and enlistment as militiamen of male British subjects ordinarily resident in Great Britain between the ages of twenty and twenty-one. That Act too was superseded by the introduction of compulsory service for all males of military age after the outbreak of war. The Reserve and Auxiliary Forces Act, 1939, also passed in May of that year, provided for calling out for service by Order in Council the members of any of the reserve or auxiliary forces, and under it the Naval Reserve, Army Reserve and Air Force Reserve were called out and the Territorial Army and Auxiliary Air Force were embodied. The Armed Forces (Conditions of Service) Act, 1939, permitted enlistment in the regular forces for the duration of " the present emergency," transfer to any corps without consent, the ordering abroad of any embodied part of the Territorial Army and of any part of the Auxiliary Air Force. The Military and Air Forces (Prolongation of Service) Act, 1939, provided that no member of the regular, reserve or auxiliary forces should be entitled to be discharged until the end of the emergency.[1] The National Service (Armed Forces) Act, 1939, introduced liability to compulsory military service for all males—subject to certain exceptions including conscientious objectors and regular ministers of any religious denomination—between the ages of eighteen and forty-one. The Act contained provisions for reinstatement in civil employment. The National Service Act, 1941, extended the liability to compulsory whole-time service to service in the Civil Defence Forces. Later in the same year the National Service (No. 2) Act, 1941, raised the age of liability to compulsory service in the forces to fifty-one and rendered women so liable as well as men. Women could be called up to serve in the Women's Royal Naval Service, the Auxiliary Territorial Service and the Women's Auxiliary Air Force. A woman could not, however, be required to use a lethal weapon without her written consent. This Act declared all persons of either sex to be liable to national service, whether under the Crown or not, and whether in the armed forces of the Crown, in civil defence, in industry, or otherwise. Liability to whole-time service in the forces remained restricted to those between the ages of eighteen and fifty-one, but any person might by Defence Regulations be directed to part-time service in the armed forces or civil defence forces or to whole or part-time service in any form of national service including civil defence employment. The Emergency Powers (Defence) Act, 1940, had made provision for Defence Regulations to compel persons to place themselves, their services and their property at the disposal of His Majesty, and these Defence Regulations were made under the authority of

[1] The Royal Marines were covered by separate legislation.

this Act which was intended to rally the nation to resist invasion. The Civil Defence Forces are the Police War Reserve, the Civil Defence Reserve, the National Fire Service, and the Kent County Civil Defence Mobile Reserves. The range of civil defence services (now largely dispersed) was, however, wider and embraced service under the local authorities as air-raid wardens, rescue workers, ambulance drivers, mainly as part-time workers with a nucleus of whole-time salaried officers. The Allied Powers (War Service) Act, 1942, provided that the National Service Acts, 1939 to 1941, might apply to the nationals of allied States who were not serving in their own forces. Thus was rapidly built up by a series of elaborate statutory provisions, partly Acts of Parliament, partly Defence Regulations and orders and directions issued thereunder, the conception of national service for total war.

B.

Composition and Discipline of the Royal Marines, Navy and R.A.F.

Royal Marines.

The Royal Marines, a force of infantry and artillery, form part of the regular forces and are liable for general service on board ship and on shore. Although this force is raised and maintained by the Admiralty for naval service, its discipline and regulation when employed on shore is provided for by the Army Act with some modifications. When on board one of His Majesty's ships a marine comes under the Naval Discipline Acts. The Army and Air Force (Annual) Act sanctions the Marines as part of the regular forces, but does not restrict their number.

The Royal Navy.

The Navy is the senior branch of the forces, but its constitutional interest is less. Unlike the Army, the Navy did not in former times come under the suspicion of Parliament. There is no reason to suppose that naval service was regarded as less burdensome than service in the Army, or that naval discipline could be enforced without interfering with the common law rights of the sailor as citizen. But the Navy had never been used by the King to coerce Parliament and so was not included in the prohibition in the Bill of Rights against a standing armed force. It has remained a prerogative force maintained on a permanent footing. So much is this so that the recruitment of the Navy by impressment has never been declared illegal, though the press-gang has, of course, long fallen into disuse. Enlistment is governed by the Naval Enlistment Acts, 1835 to 1884, discipline by the Naval Discipline Act, 1866, as subsequently amended. Both types of enactment are permanent and do not come under annual review by Parliament for renewal. Conditions of service and regulations for discipline so closely resemble

those applicable to the Army and Air Force that they do not call for separate discussion. Despite its prerogative basis, the Navy comes under the control of Parliament, since its estimates are presented annually, as are those of the other services, to Parliament and the consequential votes in Committee of Supply afford full opportunity for discussion of naval administration and expenditure, which on account of constructional requirements is often controversial.

Naval Reserve.

The Naval Reserve consists of two main divisions: the Royal Naval Reserve, recruited from members of the Merchant Navy; and the Royal Naval Volunteer Reserve which includes an Air Branch and provided the huge expansion in commissioned rank during the Second World War. A division of the Naval Reserve known as the Royal Fleet Reserve consists mainly of persons in receipt of pensions in respect of service in the Navy or Marines.

Dominion Navies.

Naval forces, under the control of their own Parliaments and Governments for all purposes, including discipline,[1] except when serving with the Royal Navy,[2] are maintained by three of the Dominions, Canada, Australia and New Zealand.

Royal Indian Navy.

India possesses a comparatively small force largely for the purpose of replacing the Royal Indian Marine for survey and police purposes. It is subject to Indian legislation.

Royal Air Force.

The Royal Air Force was constituted in 1917 a force separate from both the Army and the Navy. The naval arm was transferred back to the Royal Navy before the Second World War as the Fleet Air Arm The Air Force does not call for separate notice from the point of view of constitutional law, as its position is identical with that of the Army.

[1] See Naval Discipline (Dominion Naval Forces) Act, 1911.
[2] See Colonial Naval Defence Act, 1931.

CHAPTER 2.

MILITARY LAW AND COURTS-MARTIAL.

A.

Military Law.

Nature of Military Law.

MILITARY Law is contained in the Army Act, 1881,[1] and the Acts relating to the auxiliary and reserve forces as subsequently amended. These are supplemented by rules of procedure, by King's Regulations and other regulations, by Royal Warrant, *e.g.* as to pay and promotion, and by Army Orders. An army cannot be disciplined by the ordinary law applicable to civilians. Any association of individuals organised for the achievement of a particular object is bound to lay down certain rules by which the members agree to be bound on joining. In the case of a " members " club these rules are purely contractual and in no way conflict with the ordinary law of the land, to which all the members remain subject. In the case of the learned professions, particularly the law and medicine, the special rules are to some extent impressed with the authority of the State, being enforceable in some cases by statutory tribunals. With the armed forces of the Crown the sanction of Parliament is required for the more stringent provisions which are essential for preserving military discipline; but the courts through the prerogative orders only play the part of supervisors of the special military tribunals (courts-martial) which are established by the Army Act for adjudication upon offences against military law. Prior to 1879 military law in time of peace consisted of those rules which were sanctioned each year by the Mutiny Act. From 1715 the form of the statute was to implement the prerogative right, exercisable in time of war only, to make articles of war, by extending the right to time of peace. By the provision of a code of rules, governing both peace and war, in the Army Act, 1881, all important changes are now brought under review by Parliament annually when it renews the code for another twelve months and enacts necessary amendments by the Army and Air Force (Annual) Act.[2] There is also power to make rules of procedure for the administration of military law. These rules must not conflict with the Army Act

[1] Applied with modifications to the Royal Air Force by the Air Force (Constitution) Act, 1917. See p. 338, *ante*.

[2] There is still power for the Crown to promulgate articles of war. Such articles must be judicially noticed, but may not inflict capital punishment or penal servitude, except with regard to crimes made so punishable by the Army Act, nor punish any crimes made offences by the Act, save as therein prescribed. No articles of war are at present in force. Army Act, 1881, s. 69.

and must be laid before Parliament. They are an important safeguard ensuring the conduct of a trial by court-martial on the lines of a criminal trial in a civil court, but there is no jury.

Offences under Army Act.

The offences created by the Army Act include desertion, absence without leave, fraudulent enlistment, and two offences which well illustrate the difference between military law and ordinary law. Section 16 of the Act provides that an officer who behaves in a scandalous manner unbecoming to the character of an officer and a gentleman shall be cashiered. Section 40 provides that any person who is guilty of any act, conduct, disorder or neglect to the prejudice of good order and military discipline shall be liable, if an officer, to be cashiered or if a soldier, to be sentenced to two years' imprisonment. Section 16 is rarely used as it lays down a minimum punishment, but section 40 is largely used. This section gives a wide discretion to a court-martial to treat any conduct as a criminal offence, and it has been urged that military offences should be framed with greater particularity.

Military Courts.

The Army Act regulates the constitution and proceedings of courts-martial for the enforcement of military law. Their jurisdiction is exclusively over persons subject to military law. They are convened by high military officers. The convening order details the officers who are to serve on the court, and, if qualified by length of service, all officers are liable to serve.

There is a similarity between the constitutional procedure of civil and military courts. The lowest military court, apart from the summary and investigating powers of company and battery commanders, is the commanding officer, normally a lieutenant-colonel commanding a battalion or regiment. Officers and soldiers charged with military offences are brought before him on remand by the company commander, and his duty corresponds with that of a court of summary jurisdiction. After hearing the evidence he can either dismiss the charge or, if it is a minor charge against a soldier, he may deal with it summarily (his power of punishment is limited to twenty-eight days' detention) or order a summary of the evidence to be taken with a view to determining whether or not to send the accused for trial by court-martial. The accused has the right to trial by court-martial if the commanding officer proposes to order detention or forfeiture of pay.

Courts-Martial.

Should the commanding officer be of the opinion that a case cannot properly be dealt with summarily (and he may not punish an officer), he should send the offender for trial by court-martial. There are three forms of court-martial.[1]

[1] The tribunals, also called courts-martial, for the trial by officers of members of the Royal Navy and Royal Air Force and of other persons subject to the Naval Discipline and Air Force Acts do not call for separate treatment.

A General Court-Martial can try any offence under the Army Act, whether committed by an officer or a member of the rank and file.

A District Court-Martial cannot try an officer or award the punishments of death or penal servitude; otherwise any offence under the Act is within its jurisdiction. These two courts correspond with Assize Courts and Quarter Sessions.

A Field General Court-Martial is for the trial of offences committed on active service, or when overseas for offences committed against the local inhabitants, where a general court-martial is not practicable. In time of war service in any part of a theatre of operations is deemed for this purpose to be active service.

A trial by court-martial is very much like a trial in an ordinary criminal court. If the offender so desires, a convening officer may appoint an officer to defend. A judge advocate may be (and in the case of a general court-martial must be) appointed to advise the court as to law and to summarise the facts. The same rules of evidence and presumption of innocence apply (as also before a commanding officer) as in a criminal court. The four main differences between a trial by court-martial and trial by a criminal court are:

(*a*) The judge advocate retires with the court when they consider the finding and proposed sentence, whereas a jury retires in private.
(*b*) The court may arrive at its finding or sentence by a majority, whereas a jury must be unanimous.
(*c*) Members of the court fix the sentence subject to confirmation, whereas a jury has nothing to do with sentence.
(*d*) The Probation of Offenders Acts do not apply to military offenders, though there is power to suspend sentence.

Review of sentences.

A person sentenced by a court-martial may complain by petition to a reviewing authority, but there is no right of appeal to a higher military tribunal before which the case can be argued on its merits. Independently of petitions the proceedings of courts-martial are reviewed in the office of the Judge Advocate-General in order to detect any miscarriage of justice. The Judge Advocate-General is responsible for the administration of military and air force law. He is appointed by the Crown by letters patent. The Judge Advocate of the Fleet performs similar duties in respect of naval discipline. Sentences must be confirmed by a competent higher military authority before promulgation and may be modified by that authority. There is no power to increase the sentence recommended by the court.

Civil Courts in relation to Courts-Martial.

Courts-martial are limited to the powers conferred on them by statute. For an unlawful act done by such a court or by a military officer exercising his summary powers under the Army Act, the

person injured has his remedy in the High Court. An excess of jurisdiction may be questioned by application to the Divisional Court of the King's Bench Division for the writ of habeas corpus or an order of certiorari or prohibition. There is no doubt that certiorari lies, at the discretion of the High Court, to inferior courts which are shown, not merely to have exceeded their jurisdiction, but to have failed to observe the principles of natural justice. Nevertheless the courts have shown a marked disinclination to interfere with the decisions of a court-martial or military court of enquiry, or even with the exercise by a commanding officer of his summary powers under the Army Act and the equivalent statutes, if the objection is based on malice or lack of reasonable and probable cause. The argument is that matters falling within the scope of military discipline should be subject to review only by higher military authority. In *Heddon* v. *Evans* (1919), 35 T.L.R. 642, McCardie, J., distinguished between liability for an act done in excess of, or without jurisdiction, by the military tribunal, such as assault, false imprisonment or other tortious act, and one which, though within jurisdiction and in the course of military discipline, is alleged to have been done maliciously and without reasonable and probable cause. Only in the former case would the courts entertain proceedings against military officers. The distinction appears to lie in the fact that only when there is an excess of jurisdiction is any common law right of the complainant infringed. But this is unsatisfactory, for what may be tortious when committed in excess of jurisdiction would on this view not be tortious, although done from the worst of motives, if it can be shown to fall within military jurisdiction, *e.g.* malicious prosecution before a court-martial. It is still open to the House of Lords to hold that the action of naval or military authorities in procuring the dismissal of an officer or man from the service is open to review in a court of law: *Fraser* v. *Balfour* (1918), 87 L.J.K.B. 1116. This reluctance of the court to intervene in matters properly falling within the sphere of military affairs was also exhibited when civil proceedings for libel were brought by a subordinate officer against his commanding officer. The action was based on letters written by the latter to the Adjutant-General in the course of military duty. The plaintiff's remedy lay through military channels as provided nowadays by King's Regulations: *Dawkins* v. *Paulet* (1869), L.R. 5 Q.B.D. 94; K. & L. 341. But if the military court has exceeded its jurisdiction by applying military law to persons not subject to that law, as in *Wolfe Tone's Case* (1708), 27 St. Tr. 614, or, in the case of persons so subject, misapplying military law by punishing without regular trial or inflicting a punishment in excess of its jurisdiction, the writ of habeas corpus or certiorari procedure afford a means of reviewing

the case, and the officers concerned will be liable to an action for damages, or criminal proceedings for assault, manslaughter or even murder.

B.

Status of Members of the Forces.

Venue for trail of Offences.

A person subject to the Army Act does not cease to be subject to the ordinary law and may be tried by any competent civil court for offences against the criminal law. The position of a member of the Royal Navy or Royal Air Force is similar. Except so far as the statutes creating military law provide, a soldier enjoys all the rights of the ordinary citizen and his obligations as a soldier imposed by the Army Act and King's Regulations are in addition to his duties as a citizen. In practice most criminal offences committed by soldiers are dealt with in peace time by the civil courts, but an offence against the ordinary law committed by a person subject to military law is, at the discretion of the competent military authorities, triable by court-martial, with the exception of certain serious felonies, such as murder, which must, if committed in the United Kingdom, be tried by the competent civil court (the Assizes or the Central Criminal Court). If such felonies are committed outside the United Kingdom, they are not triable by court-martial, unless committed on active service or more than one hundred miles from a competent civil court. The Jurisdiction in Homicides Act, 1862, provides for the removal to the Central Criminal Court of the trial of a person subject to military law[1] who is accused of murder or manslaughter. Application is made to the King's Bench Division by the Secretary of State (for War or Air), if he considers that in the interests of good order and military discipline the trial should be expedited by removal to London.

Privileges.

A person subject to military law enjoys the benefit of certain privileges and exemptions from the ordinary civil law and its processes. He is entitled to vote at parliamentary and local elections.[2] When on active service he can make a will in nuncupatory form without complying with the formalities of the Wills Act, 1837, even if he be a minor. Unless he is charged with a felony or misdemeanour, or a civil claim against him exceeds £30, he cannot be taken out of the service of the Crown by being compelled to attend a civil court.

Dual Liability.

A person subject to military law, though sentenced or acquitted by court-martial, may afterwards be tried by a civil court, if the offence is one triable under the ordinary law. The sentence of the court-martial must be taken into consideration by the civil court in

[1] Under Army Act, 1881, or Air Force Act, 1917. [2] P. 76, *ante*.

awarding punishment. A person acquitted or convicted by a civil court is not liable to be tried by court-martial in respect of the same offence.

Conflict of Duty.

It is sometimes alleged that obedience to military law may conflict with a soldier's duty as a citizen. Military law is, however, part of the law of the land and obedience to it can not be unlawful. A soldier is only required to obey orders which are lawful (Army Act, 1881, s. 9) and an order which is contrary to the common law is not a lawful order. If an order involves a breach of the law, a soldier is not only under no obligation to carry it out, but is under an obligation not to carry it out. It may truly be said that this places the soldier in an awkward position. He has not time to weigh up the merits of an order; his training makes compliance instinctive. None the less unlawful injury inflicted as the result of compliance renders him liable to civil or criminal proceedings. The defence of obedience to the orders of a superior is not accepted in civil proceedings. On the other hand, if a soldier disobeys an order on the ground that it is unlawful, a court-martial may hold that it was lawful. In practice, however, a tribunal, whether court-martial or a judge and jury, would take all the circumstances into consideration and it is probably better to leave the soldier in a position of difficulty than to place him outside the ordinary law. If a prosecution results from obedience to an order, there is some authority for saying that, if the order was not necessarily or manifestly illegal, the soldier who obeys it cannot be made criminally liable. In *Keighley* v. *Bell* (1866), 4 F. and F. 763, at p. 790, this opinion was expressed *obiter* by Willes, J., and it has been followed by a special tribunal in South Africa.[1]

[1] *The Queen* v. *Smith* (1900), 17 Cape of Good Hope Supreme Court Reports 561; K. & L. 348; see also Kenny, *op. cit.*, pp. 71–73.

CHAPTER 3.

MARTIAL LAW.

Meaning of Martial Law.

THE term, martial law, means in international law the powers exercised by a military commander in occupation of foreign territory. The term, martial law, is also used to describe the action of the military when, in order to deal with an emergency amounting to a state of war, they impose restrictions and regulations upon civilians in their own country. It is this meaning of martial law that will be discussed in this Chapter. That the military may in a time of major emergency exercise such abnormal powers is recognised by common law: *Marais* v. *General Officer Commanding*, [1902] A.C. 109. The term, martial law, is, however, misleading. The powers of the military are different only in degree and not in kind from those of the ordinary citizen. Moreover they are part of the ordinary law of the land. Every citizen (and a soldier is a citizen) is under a duty to assist in the suppression of riotous assemblies and insurrections and in repelling invaders. The task of dispersing riotous assemblies in time of peace is best directed by the local civil authorities who have knowledge of local conditions. Normally an officer in command of troops will act only if called upon to do so by a magistrate. None the less he must exercise his own judgment whether to use force and, if so, how much force to use. The instructions of the civil authority will, however, rightly influence his judgment and will normally be followed.[1] In time of invasion or insurrection on a wide scale a reverse state of affairs arises. Both citizen and soldier have the same duty, but the military are in a state of war the best judges of the steps that should be taken. They are then entitled to give directions to and impose restrictions upon civilians in order to fulfil their duty to repel invaders or suppress rebels. This duty is a duty not only of the citizen but of the Executive. In time of war the Executive would normally act through military commanders. The duty is that of the Crown and its servants and of all citizens.

Interference with Civilians.

When the Government desires extra-ordinary powers for the military, emergency statutes are passed by Parliament, *e.g.* the Defence of the Realm Acts, 1914–15, and the Emergency Powers Act, 1939. None the less at common law there exist, apart from statute, powers to repel force by force and to take all necessary steps to

[1] See Evidence of Lord Haldane, then Secretary of State for War, before a Select Committee on Employment of Military in Cases of Disturbance (H. C. 236, 1908): *Manual of Military Law* (1929), p. 256.

preserve order. In the exercise of such powers the military may find it necessary to interfere with the actions, and even with the life and liberty of civilians. The relationship between the military and civilians known as a state of martial law has not arisen in this country since the Civil War of the seventeenth century. A state of martial law has, however, existed during the present century in South Africa, Southern Ireland and parts of India. The degree to which the military may interfere with civilians will vary with circumstances. The test is whether the interference is necessary in order to perform the duty of repelling force and restoring order. The military authorities would be justified in ordering civilians to quit their homes, to obey a curfew order, to dig trenches, or to render services, provided such orders were necessary for the defence of the country. If a civilian refuses to comply with such an order, the military are justified in enforcing obedience.

Military Tribunals.

In order to establish whether breaches of duty have been committed, the military may find it necessary to set up military tribunals to try civilians. Prompt punishment may be necessary as an example to others. In exceptional circumstances offenders may be condemned to death. It would on occasion be justifiable to shoot an offender without any trial at all, *e.g.* an officer in charge of troops might justifiably order his men to shoot anyone about to cut a telegraph wire with intent to assist the enemy. In every case the action taken must be judged by the test of necessity. Sometimes it would not be justifiable even to bring an offender before a military tribunal. It might be sufficient to detain him in custody until he could be brought before a civil court. The tribunals established by the military are not judicial bodies.[1] They are merely bodies set up to advise the military commander as to the action he should take in carrying out his duties: see *Re Clifford and O'Sullivan*, [1921] 2 A.C. 570. It is, however, in regard to the establishment of military tribunals that the most difficult problems regarding a so-called state of martial law arise. Before the establishment of military tribunals there will usually be a proclamation of a state of martial law, but it is not the proclamation which makes martial law, but the events which have created the emergency. Subjects have the right to question any act of the Executive or military in the courts, which can decide whether or not a state of martial law exists. A proclamation may be evidence of such a state being already in existence, but it cannot change existing conditions from a peace-time footing to one of war within the realm. The prerogative of declaring war does not enable the Crown to

[1] They must be distinguished from courts-martial established by statute. In time of emergency additional statutory powers may be conferred upon ordinary courts-martial; see p. 356, *post*.

declare war on the people. But the Executive has a common law duty, which it shares with every subject and with the military to assist in the maintenance of order. If it is compelled in the exercise of this duty to hand over control to the military forces, it acts at its own risk as regards legal responsibility, and there is a state of martial law, which is not law in the sense of a code of rules, but a condition of affairs.

When does an Emergency amount to Martial Law.

There can be no precise test to determine the state of emergency at which martial law exists. Clearly in any true emergency the authorities may have to act without regard to their strict legal powers, since perils to the public safety cannot always be suppressed by prosecuting under the criminal law or applying for an injunction in the civil courts. If the civil courts have on account of hostilities ceased to sit for the time being, the maintenance of order passes from the civil power to the military. The military can, it may be safely asserted, then take control. What is necessary in such a situation is primarily a matter of discretion for the commander-in-chief and his advisers. Even so, when the courts are again able to sit, the acts of the military may be shown to be illegal as having been in excess of what was necessary, unless confirmed or excused by an Act of Indemnity. Much has been written as to whether the test in such cases would be strict necessity or *bona fide* belief in the necessity of the action, and as to whether it would be for the defendant to show that the test had been complied with or for the complainant to show that it had not been complied with. There is no authority which makes it possible to answer these questions. Supposing that the courts have not ceased entirely to operate, as where the insurrection is confined to part of the country, military government may none the less be necessary. Martial law is thus a state of fact not to be decided by the simple test: Were the civil courts sitting at the time? The test would seem to be: Is the insurrection of such a kind that military rule is justified? It falls to the civil courts alone to determine this difficult question of fact.

Control of Military by Civil Courts.

This leads to a further problem. In so far as the civil courts may be sitting, what control, if any, have they over the acts of the military? In *Marais* v. *General Officer Commanding*, [1902] A.C. 109; K. & L. 383, the Privy Council held that such acts are not at the time justiciable by the ordinary courts sitting in a martial law area where "war is still raging." The courts will determine for themselves whether or not war exists: *The King* v. *Strickland* (*Garde*), [1921] 2 I.R., at p. 329; K. & L. 373. Once a state of war is recognised by the courts, and such recognition in the nature of things must be *ex post facto*, the Executive, with the aid of its military forces, may conduct warlike operations with impunity.

They may deal with the inhabitants of a martial law area on the same footing as with the population of hostile invaded territory in time of war, subject only, it may be presumed, to such rules of warfare as international law prescribes. It is difficult to say how far the military authorities could be called to account in the civil courts after hostilities, because an Act of Indemnity in the ordinary course would be passed by Parliament to protect them from legal proceedings.[1] Presumably such an Act would not indemnify them for acts done otherwise than in the course of *bona fide* operations for the suppression of the insurrection: *Wright* v. *Fitzgerald* (1798), 27 St. Tr. 765. But in the absence of such an enactment, it would seem that the acts of the military during war or rebellion could be challenged in the courts, though the action would not be tried so long as a state of hostilities continued: *Higgins* v. *Willis*, [1921] 2 I.R. 386; K. & L. 404.

Cases from Ireland.

The *Marais Case* was followed by the Irish courts in 1920–21. At that time the Restoration of Order in Ireland Act, 1920, was in force. That Act gave exceptional powers to the Executive, and the military were employed to execute those powers. In *The King* v. *Allen*, [1921] 2 I.R. 241; K. & L. 389, the King's Bench Division of Ireland accepted the statement of the military authority that the statutory powers were insufficient and declined to interfere with a sentence passed by a military tribunal (not being a statutory court-martial) sitting in an area where the rebellion was raging. In one case the statutory powers were exceeded and the prisoner was released as the result of habeas corpus proceedings: *Egan* v. *Macready*, [1921] 1 I.R. 265. The decision of the Irish Chancery Division in the last-named case is difficult to reconcile with *The King* v. *Allen* and has been criticised on the ground that the exceptional statutory powers were not, like the statutory powers in the *De Keyser Case*,[2] exclusive of the common law powers, and that the common law gives the Executive the right to conduct operations without interference from the courts, if a state of war is raging. The better opinion is that inadequacy of statutory powers does not disable the military from taking whatever steps are deemed necessary in good faith to restore order.[3]

Prohibition.

There is only one decision on martial law which can be regarded as binding on an English court. The House of Lords in *Re Clifford and O'Sullivan* (*ante*), (a case from Ireland before the establishment of the Irish Free State), discussed an application for a writ of prohibition to stay proceedings of a military

[1] See *Tilonko* v. *Attorney-General of Natal*, [1907] A.C. 93, for an unsuccessful petition for leave to appeal from a judgment of a military court, the sentences of which had been subsequently declared lawful by the legislature of the Colony.

[2] P. 130, *ante*.

[3] P. 353, *ante*.

tribunal set up after a proclamation of martial law. The decision turned upon the technical scope of the writ, which is only available against persons or bodies in the nature of inferior courts exercising a jurisdiction. It was held that the military tribunal in question was not such a body, but only an advisory committee of officers to assist the commander-in-chief, against which the writ could not lie. The House of Lords expressly refrained from discussing the merits of an application under a writ of habeas corpus or other process than prohibition.

Conclusion.

Thus the law, if it be correctly stated above, affords little protection to persons in a martial law area, at all events to those who have been convicted of " capital offences " under the military regime. If the courts are not sitting, they have no remedy. If the courts are in session, an order of prohibition, according to the decision in *Re Clifford and O'Sullivan* (*ante*) will not be granted, while the writ of habeas corpus is probably only available if the courts hold that war was not raging at the time of the commission of the offence (*The King* v. *Allen*, *ante*). On the other hand, it must be noted that neither *Marais*' nor *Allen's Cases* are binding on the English courts, who are, therefore, competent to say, should occasion arise, that even during a state of war the acts of the military are subject to the controlling jurisdiction exercisable by means of the writ of of habeas corpus.

The United Kingdom: First World War.

Although the military obtained, under the Defence of the Realm Acts, 1914–15, a large measure of control in the United Kingdom and in Ireland, it cannot be claimed, apart from the Irish disturbances that at any time between 1914 and 1918 a state of war was raging, despite hostilities by way of occasional enemy air-raids and bombardments from the sea. The control exercised during that period over the civilian population was strictly legal, while the courts were exercising, under certain statutory restrictions, their full functions. By the first of the Defence of the Realm Acts passed in 1914 trial by court-martial was authorised for the enforcement of regulations forbidding the sending of information to the enemy or for securing the means of communication, such as the railways and docks. Later there were added to the offences triable by court-martial rumour-mongering and offences against the Defence Regulations committed in areas where troops were being trained or concentrated. The Defence of the Realm (Admt.) Act, 1915, drastically curtailed the jurisdiction of courts-martial to try offences against the Regulations (except in case of invasion) and restored to British subjects the right to be tried by a jury in a civil court for those offences which had hitherto been punishable by courts-martial. Both civil and military authorities exceeded their legal powers from time to time, and there were many cases of the courts intervening

at the instance of persons aggrieved. It is of interest to reproduce here the main operative section of the Indemnity Act, 1920, which, subject to certain provisos, expressly restricted the indemnity afforded to the authorities to acts done in good faith and in the public interest.

> No action or other legal proceeding whatsoever, whether civil or criminal, shall be instituted in any court of law for or on account of or in respect of any act, matter or thing done, whether within or without His Majesty's dominions, during the war before the passing of this Act, if done in good faith, and done or purported to be done in the execution of his duty or for the defence of the realm or the public safety, or for the enforcement of discipline, or otherwise in the public interest, by a person holding office under or employed in the service of the Crown in any capacity, whether naval, military, air force, or civil, or by any other person acting under the authority of a person so holding office or so employed; and, if any such proceeding has been instituted whether before or after the passing of this Act, it shall be discharged and made void. . . . Indemnity Act, 1920, s. 1 (1).

Second World War.

In 1939 Parliament was not asked to supersede the jurisdiction of the ordinary courts by conferring on courts-martial the power to try persons not subject to military law. When in 1940 it became necessary to modernise the law of treason by creating the equivalent offence of treachery, the bar on trial by courts-martial was lifted, but only in respect of enemy aliens on the specific direction of the Attorney-General: Treachery Act, 1940. Trial by court-martial must be distinguished from trial by special civil courts. The Emergency Powers (Defence) (No. 2) Act, 1940, which was passed under the imminent threat of invasion, made it possible to substitute for a central system of administration of the criminal law a system of special war zone courts. These courts were only to exercise jurisdiction if the military situation was such, on account of actual or immediately apprehended military action, that criminal justice must be more speedily administered than it could be by the ordinary courts.[1] It was a condition precedent to the exercise of jurisdiction that the Minister of Home Security should first declare a particular area to be a war zone. The constitution of the war zone courts was essentially that of civil courts of record. They were never required to sit. These provisions only governed the procedure to be followed by the civil courts in the event of invasion. They did not in any way affect the common law powers of the military, but the fact that they were enacted on the eve of invasion shows the utter abhorrence of our people to any form of martial law, whatever be

[1] The Administration of Justice (Emergency Provisions) Act, 1939, had made elastic provisions for the sittings of the ordinary courts "so that the Lord Chancellor could adapt the whole judicial system to the requirements of unforeseen crises." See Sir Cecil Carr, *Concerning English Administrative Law* (Cambridge University Press), p. 81.

the academic doctrine with regard to the powers of the military to impose their will on civilians.

Contrast between First and Second World War.

In 1914 the range of offences triable by court-martial at first grew in number, but within seven months of the outbreak of war the right to trial by jury in a civil court had been restored to British subjects. In 1939 it was not intended to deprive the ordinary courts of jurisdiction, but the threat of invasion in the next year necessitated provision to guard against a breakdown in the ordinary administration of justice, and a solution was found which stopped short of substituting courts-martial for the ordinary courts. Thus within a few months of the outbreak of both wars trial in the ordinary courts was safeguarded except in the event of invasion. In 1915 courts-martial were to replace the civil courts in that event. In 1940 special civil courts were substituted, except that enemy aliens could for the most grave of all war-time offences be tried by court-martial.

PART X.

THE BRITISH EMPIRE AND COMMONWEALTH.

The Governments of the British Empire, by A. Berriedale Keith (Macmillan).

The Statute of Westminster and Dominion Status, by K. C. Wheare (Clarendon Press).

Constitutional Laws of the British Empire, Jennings and Young (Clarendon Press); a case book.

History of English Law, Vol. XI., by Sir W. S. Holdsworth (Methuen), for reference.

CHAPTER 1.

THE UNITED KINGDOM, CHANNEL ISLANDS AND ISLE OF MAN.

The United Kingdom.

ENGLAND and Wales, Scotland and Northern Ireland form the United Kingdom of Great Britain and Northern Ireland. Though England and Wales and Scotland possess a common legislature,[1] and are united for most purposes of central government,[2] Scotland has her own system of law and her own courts,[3] and her own established Church.[4] The Parliament of the United Kingdom has imperial functions, and, as the Imperial Parliament, exercises legislative supremacy over British India and the Colonies and has a special relationship with the Self-Governing Dominions.

Scotland.

Northern Ireland.

Northern Ireland possesses her own Executive, a Governor-General and Cabinet, and a Legislature of two Houses, the Senate and House of Commons. It was originally intended that Ireland should be given a wide measure of Home Rule, while remaining part of the United Kingdom. Though abandoned as far as Southern Ireland was concerned, the constitution enacted with this intention by the Government of Ireland Act, 1920, came into force in Northern Ireland. Northern Ireland has retained representation in the United Kingdom Parliament and is subject to its legislative supremacy. Certain subjects, *e.g.* laws in respect of the Crown, treaties and foreign relations generally, defence, foreign trade and coinage are reserved for the United Kingdom Government and Parliament. From the courts of Northern Ireland appeal lies to the House of Lords. Constitutional issues may be referred for determination to the

[1] Part III., Chap. 1.
[2] Part IV., Chap. 4.
[3] Part V., Chap. 1.
[4] Part XI.

Judicial Committee of the Privy Council.[1] In the event of a deadlock between the Senate and the House of Commons the Governor-General may, if a Bill is passed by the House of Commons in two successive sessions and is not agreed to by the Senate, convene a joint sitting of the two Houses. Any Bill passed by a majority at such a joint sitting becomes law. In the case of a financial Bill a joint sitting may be convened in the same session that the Bill is rejected.

The relationship thus established between the United Kingdom and Northern Ireland is not unlike a federal one with the important difference that the Parliament of the United Kingdom can legislate in amplification or in derogation of the powers of the Parliament of Northern Ireland. The Northern Ireland (Miscellaneous Provisions) Act, 1932, removed some of the causes of friction to which this relationship had given rise by giving the Parliament of Northern Ireland some additional powers, *e.g.* to enable the repeal and re-enactment of imperial legislation for purposes of consolidation.

Channel Islands.

The Channel Islands and the Isle of Man are included among the British Isles, but do not form part of the United Kingdom. The laws of the Channel Islands are based on the ancient customs of the Duchy of Normandy, of which they formed part until 1205. The sovereignty of His Majesty is, to the present day, only admitted in his right as Duke of Normandy. The Channel Islands are subject to the legislative supremacy of the United Kingdom Parliament, which is exercised for them in relation to such subjects as defence and customs. The legislative assemblies of Jersey and Guernsey, known as the States, have power to pass Acts which require the approval of the King in Council. The States of Guernsey legislate for the adjoining islands, Alderney, Sark, Herm and Jethou. The Channel Islands possess their own courts from which an appeal lies to the Judical Committee of the Privy Council. The Crown claims the right to legislate for the islands by Order in Council, but it is doubtful how far such Orders in Council, which are registered in the Royal Courts of the Islands, are effectual until so registered.[2] The States and Royal Courts of Jersey and Guernsey are presided over by a Bailiff appointed by the Crown.

Isle of Man.

The Isle of Man has its own Parliament, known as the Tynwald Court; it consists of the Governor and Council and the House of Keys. There is a general power to legislate subject to the approval of the King in Council. The Isle of Man also has its own courts, from which an appeal lies to the Judicial Committee of the Privy Council.

[1] Government of Ireland Act, 1920, s. 51.

[2] The Royal Courts may request reconsideration of an Order in Council, but can in the last resort be compelled to register it: Halsbury, *Laws of England* (ed. Hailsham), Vol. XI., p. 143.

CHAPTER 2.

THE COLONIES, PROTECTORATES AND MANDATED TERRITORIES.

A.

The Colonies.

Introductory.

THE British Commonwealth and Empire overseas falls naturally into three groups, the Self-Governing Dominions, India, the Colonies. The whole is united by the tie of common allegiance to the Crown, and all its nationals enjoy the status of British subjects, wherever they may be, by reason of their common nationality. Each group, however, requires separate treatment in a discussion of its relationship with the United Kingdom. As the Dominions have evolved out of colonies, their present status cannot be understood without some knowledge of the status of a colony.[1]

The Constitutional Law of the Colonies.

Variety and individuality are features of the British colonial system, and colonial constitutions vary infinitely, but all the colonies possess one common feature that distinguishes them from the self-governing Dominions. They are subject in fact to the legislative supremacy of the Imperial Parliament and to the right of the Crown to disallow their legislation on the advice of the Imperial Government.[2] Further, the great majority of the colonies are subject to legislation under the prerogative by Order in Council or letters patent.[3]

Colonial Constitutions.

Colonial constitutions are mainly to be found in letters patent issued by the King in Council constituting the office of Governor and in formal instructions to the Governor issued by the King in Council. The Imperial Parliament may, of course, enact constitutional provisions for a colony, *e.g.* the Malta Constitution Act, 1932, which provided for the appointment of judges in Malta, or may give legislative force [4] to a constitution enacted by a colonial legislature, *e.g.* the Bill establishing a Constitution for Victoria, but almost always the Imperial Parliament authorises the King in Council, where such authorisation is needed,[5] to grant a constitution by Order in Council, *e.g.* British Guiana Act, 1928.

Distinction between Settled and Conquered or Ceded Colonies.

Sometimes the Crown can legislate for a colony by virtue of the prerogative without the necessity of parliamentary authorisation.

[1] The term, Crown Colony, denotes a colony without responsible government, *i.e.* Cabinet government.

[2] For position of Dominions, see Chap. 3., *post.*

[3] P. 362, *post.*

[4] Victoria Constitution Act, 1855, which empowered the Queen to assent to the Bill, which had been reserved on account of repugnancy, see pp. 372–3, *post.*

[5] *Sammut* v. *Strickland*, [1938] A.C. 678.

Settlers, however, carried with them English law, both the common law and, in so far as it was applicable, enacted law existing at the time of the settlement. The Crown could not by virtue of the prerogative legislate for or impose taxes upon a settled colony. Either the powers of the Imperial Parliament had to be invoked, or the Crown might establish a representative legislature within the colony. In 1887, however, the British Settlements Act empowered the King in Council to legislate for any settled colonies which were not at the time of the passing of the Act within the jurisdiction of any legislature. This power may be delegated to not less than three persons in the colony.

The Rule in *Campbell* v. *Hall.*

Conquered and ceded colonies preserve their own system of law, *e.g.* Roman-Dutch law in South Africa, old French law in Quebec, until the laws are changed. For such colonies the Crown may legislate by virtue of the prerogative, but once the Crown has granted a representative legislature to a colony, the power to legislate and raise taxes has been irrevocably abandoned, so long as the legislature continues to exist, except in so far as it is expressly reserved by the instrument granting the constitution.[1] It is for this reason that, in almost all letters patent creating colonial constitutions power is reserved to amend the letters patent in relation to certain reserved subjects. Where the Crown, as in Ceylon, a conquered and ceded colony, has reserved the power to revoke, alter or amend the constitution, the power may be exercised retrospectively. In *Abeyesekera* v. *Jayatilake*, [1932] A.C. 260, the respondent had rendered himself liable to penalties for sitting and voting in the Ceylon Legislative Council by reason of a disqualification under an Order in Council of 1923; it was held that a later Order of 1928 had retrospectively removed the disqualification. Where power to legislate is not reserved, an Act of the Imperial Parliament is necessary to authorise constitutional amendment by Order in Council.[2] Many colonies which in early colonial days received grants of representative legislatures subsequently surrendered their constitutions and received in exchange constitutions which reserved the right of the Crown to legislate by Order in Council. All colonies are to-day subject to such legislation, except the Bahamas, Barbados, Bermuda, the Leeward Islands and British Honduras.[3]

[1] *Campbell* v. *Hall* (1774), Lofft. 655; J. & Y. 39.

[2] There is no justification for the suggestion made in *North Charterland Exploration Co.* v. *The King*, [1931] 1 Ch. 169, that the rule in *Campbell* v. *Hall* has no effect since the passing of the Foreign Jurisdiction Acts, 1890–1913. These Acts, which regulate the exercise by the Crown of jurisdiction in foreign territory, have no application to British territory, and the rule is still of authority; see *Abeyesekera* v. *Jayatilake* (*ante*).

[3] The power to legislate by Order in Council is not used for ordinary legislation, but is reserved for constitutional amendment and emergencies.

Annexation.

Where annexation is the result of a treaty of cession with a native ruler, the treaty may contain provisions preserving or modifying private or community rights.[1] The annexation of territory is, however, an act of State[2] and an obligation undertaken upon annexation to protect private property, though in accordance with international law, is not enforceable by a municipal tribunal, unless the terms of the treaty of cession have been made part of municipal law.[3] An act of State must be accepted as effective,[4] and no special formality is required for annexation.[5]

Power of Constitutional Amendment.

In a colony that possesses a representative legislature (a legislative body of which at least one-half the members of one house are elected by inhabitants of the colony) the legislature may amend its constitution freely, provided that such amendments do not conflict with either imperial or its own legislation, if such legislation prescribes any particular procedure for constitutional amendment. The power of amendment will not, however, extend to a complete abdication of its functions by a legislature which attempts to create and endow with its own capacity a new legislative body not created by the Act to which it owes its own existence: *In re the Initiative and Referendum Act*, [1919] A.C. 935. Non-representative legislatures are not given power to amend the constitution.

Governors.

The Governor of a colony is both in form and in fact the executive. "The government of a Crown colony consists of the direct personal rule of the Governor."[6] The Governor is appointed by the Crown, represents the Crown, and is responsible to the Crown. He must obey any instructions that he receives from the Secretary of State for the Colonies through the Colonial Office.[7] He is usually assisted by an executive council which he must consult, but he may disregard its advice. The chief officer of a colony under the Governor is the Colonial Secretary. The daily work of administration is performed by district officers who under varying names and forms appear in almost all the regions which are under the Colonia Office. A Governor is appointed to hold office during His Majesty's pleasure, but does not normally hold office for more than six years. A Governor derives his authority from his commission. He does not by virtue of his office enjoy the full immunities or prerogatives of the King, but only such as are expressly

[1] *Amodu Tijani* v. *Secretary, Southern Nigeria*, [1921] 2 A.C. 399.
[2] Part IV., Chap. 9, A.
[3] *Cook* v. *Sprigg*, [1899] A.C. 572; *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] A.C. 308; *Secretary of State for India* v. *Sardar Rustam Khan*, [1941] A.C. 356.
[4] *Salaman* v. *Secretary of State for India*, [1906] 1 K.B. 613; K. & L. 297.
[5] *In re Southern Rhodesia*, [1919] A.C., 211 at p. 238.
[6] *The Colonial Service*, by Sir Anton Bertram (Cambridge University Press).
[7] Note article 28 in Appendix C, p. 449, *post*, for detailed nature of Colonial Office control.

or impliedly conferred upon him by statute or by his commission.[1] The commission does not enumerate specific powers, but refers to the letters patent constituting the office of Governor and providing for the government of the colony and to the instructions to the Governor of the colony. These two documents form the constitution of a colony.[2] The former lays down the constitutional framework, *e.g.* it provides for the establishment of an executive council. The latter sets out the Governor's duties, *e.g.* it provides for the Governor's obligation to consult his executive council. A Governor may be sued in a civil action either in the courts of his colony[3] or in England.[4] He is liable on contracts made personally but not on those made on behalf of the government.[5] Where he is sued in tort, it is a defence if he shows that the act complained of is both within the authority of the Crown and within the authority conferred by his commission.[6] Proceedings against a Governor for crimes committed in his government are heard in England in the King's Bench Division or in some county specially assigned.[7]

Colonial Legislatures: Classification.

There is infinite variety in the composition of colonial legislatures. An attempt may be made to classify some of the colonial constitutions as follows:—

I. Colonies with responsible government and representative legislatures: Southern Rhodesia, Ceylon (partial responsible government).

II. Colonies with representative legislatures, but not responsible government: Bahamas, Barbados, Bermuda.

III. Colonies with semi-representative legislatures, partly elected and without an official majority: Malta,[8] British Guiana, British Honduras, Trinidad, Leeward Islands, Mauritius, Dominica, Antigua, Montserrat, St. Kitts, St. Lucia, St. Vincent, Grenada.

[1] This applies also, as does the method of appointment, to a Governor-General of a Dominion; see, however, p. 392, *post.*

[2] To understand the nature of a colonial constitution it is essential to study the documents given in Appendix C, pp. 434–450, *post.*

[3] *Hill* v. *Bigge* (1841), 3 Moo. P.C.C. 382.

[4] *Fabrigas* v. *Mostyn* (1774), 1 Cowp. 161; *Phillips* v. *Eyre* (1870), L.R. 6; Q.B. 1; K. & L. 431.

[5] *Macbeath* v. *Haldimand* (1786), 1 T.R. 172; K. & L. 260. The remedy is petition of right or other statutory remedy.

[6] *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102; K. & L. 462.

[7] 11 & 12 Wm. 3, c. 12, and 42 Geo. 3, c. 85. These Acts do not extend to felonies (*The King* v. *Shawe* (1816), 5 M. & S. 403). A Governor can, as any other British subject, be tried in England for certain crimes, *e.g.* murder, bigamy, wherever committed; see Kenny, *op. cit.*, p. 489. It is possible that a Governor may also be prosecuted in the courts of his colony; see for discussion of this question Ridges, *Constitutional Law of England*, 7th ed., by A. Berriedale Keith (Stevens), pp. 546–7.

[8] P. 365, *post.*

IV. Colonies with legislatures with an elected or nominated unofficial minority, but with an official majority: Aden, Falkland Islands, Fiji, Gambia, Gold Coast, Hong Kong, Kenya, Nigeria,[1] Sierra Leone, Seychelles, Straits Settlements.

V. Colonies with no legislative assembly: Ashanti, Basutoland, Cyprus, Gibraltar, Gilbert and Ellice Islands, St. Helena.

Jamaica. A new constitution for Jamaica was introduced in 1944 [2] with an elected lower house, a nominated upper house, and an executive council consisting partly of elected and partly of nominated members. The elected members of the executive council will be chosen by the lower house—an embryo ministerial system which may prove a model for post-war colonial constitutions.

Malta. Malta possessed self-government from 1920–1930, save for the reservation of certain subjects to the Imperial Government and Parliament. The Maltese legislature consisted of two houses, a Senate in which representation was based upon vocations, the nobility, the church, the professions, merchants and trade unions, and an Assembly elected on a male franchise. It could not legislate upon subjects that affected the safety and defence of the Empire, or the general interests of British subjects not resident in Malta. On reserved subjects the Crown legislated by Order in Council, or the Governor might legislate by ordinance. In relation to reserved subjects the Governor was advised by a nominated council, and in relation to non-reserved subjects by an executive council of Ministers. Joint meetings of the two councils could be held. Owing to a constitutional crisis the Malta constitution was suspended in 1930, and was restored in 1932 with further restrictions on the powers of the legislature. In 1933 the constitution was again suspended and the Governor resumed control. In 1939 there was established by letters patent a Council of Government with an unofficial majority.[3]

Southern Rhodesia. Southern Rhodesia, which is under the Dominions Office, and not the Colonial Office, possesses responsible government, save for constitutional provisions protecting native interests.

Ceylon. An entirely novel constitution was introduced in Ceylon in 1931,[4] based upon the model of the London County Council. The State Council of fifty elected and not more than eight nominated members

[1] A new constitution for Nigeria is now (1945) under consideration. The proposals put forward by the Governor provide for an unofficial majority in the legislative council and also for a majority of African members: see *Proposals for the Revision of the Constitution of Nigeria*, 1945, Cmd. 6599.

[2] Jamaica (Constitution) Order in Council, 1944, S.R. & O., 1944, No. 1215.

[3] For the constitutional history of Malta, see *Sammut* v. *Strickland*, [1938] A.C. 678.

[4] 1931, Cmd. 3862; see also 1928, Cmd. 3131.

is both an executive and legislative body. Foreign affairs, finance and justice are under officers of state, but the ordinary business of government is in the hands of seven committees of the State Council, whose chairmen are the departmental ministers. These committees are advised but not controlled by the three officers of state, the Chief Secretary, the Attorney-General and the Treasurer. The Governor has paramount emergency powers. This constitution represents an attempt to find a fresh method of avoiding the divorce of power from responsibility without adopting the English system of responsible government. Full power is reserved to amend or revoke the constitution by Order in Council.

The United Kingdom Government in 1943 affirmed its intention to review the constitution of Ceylon with a view to the grant of full responsible government in all matters of internal civil administration. A Royal Commission visited Ceylon for this purpose early in 1945.

The Official Majority.

The Bahamas, Barbados and Bermuda possess wholly elected legislative assemblies, but have nominated second chambers (legislative councils). Some colonies possess no legislative assemblies, legislative power belonging to the Governor. The other colonies possess legislative assemblies, either partly elected or wholly nominated, but in all except Jamaica,[1] British Guiana and British Honduras there are provisions for an official majority by means of which the Governor may in the last resort control the legislature.[2] "The official majority is the very kernel and essence of Crown colony government."[3] In some colonies, *e.g.* Ceylon, there is a universal adult franchise; in others there are property or literacy qualifications.

Tendencies towards Federation.

Where neighbouring colonies have common interests there is a tendency to develop machinery for consultation. The Windward Islands (Grenada, St. Lucia, St. Vincent and Dominica) have a common Governor. There are strong advocates for federation of the West Indian colonies which have common economic and defence problems. The aim of British policy is the development of federation at such time as the balance of opinion in the various colonies is in favour of a change.[4] During the Second World War bases were leased to the United States for ninety-nine years on several West Indian Islands, the Bahamas and British Guiana,[5] and a joint Anglo-American Caribbean Commission was established to effect collaboration in that area. The Commission has inaugurated a regular system of West Indian Conferences with a continuing existence and a central secretariat.[6] There are four British members

[1] P. 365, *ante*.
[2] For Trinidad, see p. 364, *ante*, note 9.
[3] Sir Anton Bertram, *op. cit.*
[4] H. C. Deb., 5th Series, Vol. 411, col. 1682.
[5] Also on Bermuda and Newfoundland.
[6] *Report of West Indian Conference held in Barbados*, 1944, Colonial Office, No. 187.

of the Commission, two of whom are elected by the colonial legislatures. In 1940 the United Kingdom Government appointed a controller of West Indian welfare and development responsible to the United Kingdom Government and obliged to submit annual reports to Parliament. In East Africa there is a Governor's Conference of the Governors of Kenya, the protectorates of Uganda and Zanzibar, and the mandated territory of Tanganyika. The conference has a permanent secretariat. During the Second World War common supply and production boards were established for the four territories. In West Africa the necessities of defence led in 1942 to the appointment of a Minister Resident to preside over regular conferences of the Governors of the West African colonies and protectorates.

Justice in the Colonies.

The chief court in each colony is usually a Supreme Court. Certain colonies are grouped together to constitute an appellate court, *e.g.* the West Indian Court of Appeal for Trinidad, Tobago, the Windward Islands, Leeward Islands, and British Guiana and Barbados. Appeals lie from the highest court in any colony [1] to the Judicial Committee of the Privy Council.[2] A writ of habeas corpus may not issue out of England to any colony which has a court with authority to issue the writ, but where there is no such court in a colony, an English court will grant the writ: Habeas Corpus Act, 1862; cf. *Sprigg* v. *Sigcau*, [1897] A.C. 238.

Powers of Colonial Legislatures.

Within its territorial limits and subject to the rule enacted in the Colonial Laws Validity Act, 1865, s. 2, that any colonial law repugnant to an Act of the Imperial Parliament extending to the colony (or any order or regulation made under such Act) shall to the extent of such repugnancy be void and inoperative, a colonial legislature has full power and is not the delegate of the Imperial Parliament. It can, therefore, itself delegate the power to legislate by regulation to the executive officials of the colony: *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Powell* v. *Apollo Candle Co.* (1885), 10 App. Cas. 282. In some cases power to legislate with extra-territorial operation has been conferred by Acts of the Imperial Parliament; Army Act, 1881, s. 177; Merchant Shipping Act, 1894, ss. 735, 736; Emergency Powers (Defence) Act, 1939, s. 5.

Reservation and Disallowance.

All colonial legislation requires the assent of the Governor. The Governor may either refuse his assent at once, or may reserve a Bill until the pleasure of the Crown, which means the pleasure of the Imperial Government, is known. A Governor's instructions contain provisions requiring the reservation of specific classes of

[1] Where colonies are grouped for the purpose of appeals, there is sometimes a right of appeal to the Privy Council from the appellate court only; sometimes both from the appellate court and also direct from the colonial Supreme Court.

[2] Chap. 5, *post*.

legislation, and similarly where, as in the case of the Dominions, the constitution is contained in a statute, the statute almost always makes specific provision for the reservation of special classes of measures. Apart from his instructions a Governor may on his own initiative reserve a Bill. Frequently a Bill itself contains a clause providing for reservation. Even when the Governor's assent has been given, the Crown may disallow colonial legislation. The various constitutions provide for the period, usually one or two years, within which the power to disallow may be exercised. Where there is a non-official majority in a colonial legislature, the constitution usually provides that the Governor may, when essential for law and order, pass legislation without the consent of the legislature.

B.

Protectorates and Mandated Territories.

Protectorates.

Protectorates are not part of the British Empire. Some are territories which are governed as though they were colonies, but have for various reasons not yet been annexed [1] to the British Empire. Others are semi-independent States which by treaty or the consent (sometimes enforced) of native rulers have accepted British protection; in some of these States (called "protected States") the Crown does not exercise jurisdiction so as to enable it to legislate under the Foreign Jurisdiction Acts (*post*). The degree and the extent of the exercise by the protecting State of those sovereign powers which have been described as "a bundle or collection of powers which may be separated one from another," vary infinitely from protectorate to protectorate. Thus British North Borneo is almost autonomous and is administered by a chartered company; the African protectorates of Bechuanaland and Swaziland are governed as colonies under a High Commissioner, who also administers the Colony of Basutoland.[2]

Foreign Jurisdiction Acts, 1890 and 1913.

A protectorate which is internally autonomous may be called a protected State; a protectorate that is in fact governed by the protecting State may be called a colonial protectorate. All protectorates have this in common, that their foreign relations are controlled by the protecting State. As a consequence, international law demands that the protecting State should provide some protection for foreigners in the protectorate, though the standard

[1] See Appendix C, p. 427, for Order in Council annexing territory.

[2] The office of High Commissioner for these territories was formerly held by the Governor-General of the Union of South Africa; on the latter becoming the personal representative of the King in the Union, the office was separated and held at first by the High Commissioner of the United Kingdom in the Union, as such. In 1934 the offices were separated, but continued to be held by the same official of the United Kingdom Government.

required must vary with the conditions. Protectorates are foreign countries, and their inhabitants, known as British protected persons, are not British subjects, though they may in return for protection owe unlimited duties of allegiance: *The King* v. *Crewe, ex parte Sekgome*, [1910] 2 K.B. 576. The Crown legislates for colonial protectorates by Order in Council under the Foreign Jurisdiction Acts, 1890 and 1913. These Acts were originally intended to provide for the exercise by the Crown of jurisdiction over British subjects in foreign countries, where such jurisdiction was acquired by treaty or grant, *e.g.* where British subjects had extra-territorial rights and jurisdiction was exercised by consular or other similar courts. They have, however, been also applied to the exercise of jurisdiction in protectorates over both British protected persons and foreigners: *The King* v. *Crewe, ex parte Sekgome* (*ante*). The issue of an Order in Council under the Foreign Jurisdiction Acts is a legislative act; *North Charterland Exploration Company* v. *The King*, [1931] 1 Ch. 169, and the Crown cannot, except by statute, fetter the subsequent exercise of its right to legislate: *Sobhuza II.* v. *Miller*, [1926] A.C. 518.

Indirect Rule.

Constitutions are given to colonial protectorates just as though they were colonies, and it is sometimes more convenient to administer a territory as a protectorate rather than as a colony. This is especially so in those parts of Africa where there is in force the system of indirect rule—government by native chiefs advised by British officials.

Acts of State.

An act of the Crown in a protectorate in relation to a native inhabitant is an act of State [1] and cannot be questioned in a British court. In *The King* v. *Crewe, ex parte Sekgome* (*ante*) there was refused an application for a writ of habeas corpus by the chief of a native tribe in Bechuanaland; and Vaughan Williams, L.J., said: "The idea that there may be an established system of law to which a man owes obedience, and that at any moment he may be deprived of the protection of that law, is an idea not easily accepted by English lawyers. It is made less difficult if one remembers that the protectorate is over a country in which a few dominant civilised men have to control a great multitude of the semi-barbarous."

Mandated Territories.

Mandated territories are not part of the British Dominions. They are former territories of Germany and Turkey, the administration of which was after the First World War entrusted to the British Crown by the League of Nations, which supervised the carrying out of the mandates by means of a Permanent Mandates Commission.[2]

[1] Part IV., Chap. 9. Not so in colonies after annexation. For habeas corpus in colonies, see p. 314, *ante*.

[2] See on Mandates, Oppenheim, *International Law*, 5th ed., Vol. I., pp. 184–200 (Longmans).

It is clear that the position of mandated territories will be reconsidered in view of the disappearance of the League of Nations. Mandated territories are divided into three classes: Class A, *e.g.* Palestine, a future independent State to which the mandatory must give advice and assistance; Class B, *e.g.* Tanganyika, in which the mandatory is responsible for internal administration, but must provide equal opportunities for trade and commerce to other members of the League of Nations; Class C, *e.g.* The Cameroons, which, subject to certain obligations, may be administered as an integral part of the mandatory's own territory. Mandates of this type have also been entrusted to the Dominions, *e.g.* Samoa to New Zealand. The Crown legislates under the Foreign Jurisdiction Acts for mandated territories entrusted to the United Kingdom Government.[1] The inhabitants of a mandated territory owe allegiance to the mandatory power and in *The King* v. *Christian*, [1927] A.D. 101, the Supreme Court of South Africa decided that the mandatory power has sufficient internal sovereignty over mandated territory to permit the conviction of an inhabitant for treason. The inhabitants of a mandated territory retain their original nationality.[2]

[1] For the legal basis of Dominion legislation for mandated territories, see *The British Dominions as Mandatories*, by H. V. Evatt (Melbourne University Press).

[2] *The King* v. *Ketter*, [1939] 1 All E.R. 729.

CHAPTER 3.

THE DOMINIONS.

Introductory.

THE Dominions are the Dominion of Canada, the Commonwealth of Australia, New Zealand and the Union of South Africa. Since 1933 the constitution of Newfoundland—a Dominion within the definition of the Statute of Westminster—has been suspended.[1] The Irish Free State occupies a distinctive position which will be discussed later.[2] The Dominions are free and autonomous communities which were at one time (with the exception of Eire (the Irish Free State), formerly part of the United Kingdom) colonies subordinate to the United Kingdom, but have now attained a new and unique status. With the United Kingdom they are "equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations."[3] There is no precedent for this evolution of a colony into an autonomous and yet associated nation which remains subject to the Crown and yet has attained independence, and it is impossible to understand the present relationship between the Dominions and the United Kingdom without regard to past history. The Imperial Conference of 1926 affirmed that "equality of status," so far as Britain and the Dominions are concerned, is the root principle governing our inter-imperial relations. "But the principles of equality and similarity appropriate to status do not universally extend to function. Here we require something more than immutable dogmas."[3] Although in some matters, *e.g.* defence and foreign affairs, the United Kingdom still exercises functions which are not exercised by all the Dominions even since 1926, there has been a rapid advance by the Dominions towards equality of function as well as equality of status. There still remain, however, survivals of the legal supremacy of the Imperial Parliament which was once just as actual in relation to the Dominions as it is to-day in relation to the colonies. But these survivals remain at the desire of the Dominions concerned, and the supremacy can only be exercised to-day at their express request, just as the Dominions can assume equal function with the United Kingdom whenever they desire to do so. The question of legal relationship is further complicated by the fact that Canada and the Commonwealth of Australia are federations composed respectively

Dominion Status.

[1] P. 384, *post*.
[2] P. 384, *post*.
[3] Imperial Conference, Summary of Proceedings, 1926, Cmd. 2768

of Provinces and States which were before federation separate self-governing colonies, and which still preserve traces of a direct relationship with the Crown and the United Kingdom in its Imperial aspect.

Responsible Government.

All the Dominions have, like the United Kingdom, responsible government, that is, government by an executive which is responsible to, and must normally command a majority in an elected legislature, which alone can impose taxes and without whose authority laws cannot be made. The granting of representative institutions to a colony has usually proved the first stage on the road to responsible government. An irresponsible executive cannot for long work in harmony with an elected legislature, and with three exceptions, the Bahamas, Barbados and Bermuda, those colonies that attained representative institutions have either lost them or have advanced to responsible government. Responsible government in the Dominions was inspired by the Durham Report of 1839. Instructions were first sent to the Governor of Nova Scotia and to Lord Elgin in Canada in 1848 that they should act on the advice of Ministers acceptable to the representative legislatures. There followed the grant of responsible government to Newfoundland, the other provinces of British North America, and the Australian and South African colonies. In each case a relaxation of imperial control followed the grant of responsible government, although, just as responsible government was granted without being expressly embodied in the several colonial constitutions, so the formal legal supremacy of the Imperial Parliament was not limited until the Statute of Westminster, 1931; but for long the Dominions have exercised complete internal sovereignty and have been free from all control by the Parliament and Government of the United Kingdom.

Colonial Laws Validity Act, 1865.

The first great legal landmark after the granting of responsible government was the passing of the Colonial Laws Validity Act, 1865. The courts of South Australia, in a series of judgments delivered by Mr. Justice Boothby in the middle of the nineteenth century, cast doubts upon the validity of colonial legislation that conflicted with English law. This application of a doubtful common law rule that legislation by a colonial legislature was void if repugnant to the law of England, whether common law or statute law, would have stultified the recent grants of responsible government. Accordingly the Act was passed in order to make it plain that within its own sphere a colonial legislature was sovereign and was subordinate only to the Imperial Parliament. By this Act, "An Act to remove doubts as to the validity of colonial laws," a legislature is defined as the authority, other than the Imperial Parliament or the King in Council, competent to make laws for the colony and a representative legislature is defined as a legislature

comprising a legislative body of which one-half are elected by the inhabitants of the colony. The provisions of the Act relate only to colonies possessing legislatures. It was enacted—

(*a*) that colonial laws which are in any respect repugnant to an Act of the Imperial Parliament extending to such colony shall be read subject to such Act and to the extent of such repugnancy shall be void and inoperative;

(*b*) that no colonial law shall be void by reason only of repugnancy to the law of England, *i.e.* the common law as opposed to statute law applicable to the colony;

(*c*) that no colonial law shall be void by reason of any instructions given to the Governor other than the formal letters patent which authorise the Governor to assent to Bills;

(*d*) that every colonial legislature shall have power to establish courts of judicature and every colonial representative legislature shall have power to make laws respecting the constitution, powers and procedure of its own body, provided that such laws are passed in such manner and form [1] as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony.

The Privy Council, affirming a decision of the High Court of Australia, held invalid a Bill to abolish the Legislative Council of New South Wales which was not passed in accordance with a colonial Act requiring the approval of the electorate to be given to such a measure.[1] The Colonial Laws Validity Act, 1865, required that a law respecting the constitution should be passed in the manner and form provided by existing legislation. The Privy Council rejected the argument that the colonial Act requiring the approval of the electorate was invalid as fettering the freedom of a future legislature, but was not called upon to decide whether the Supreme Court of New South Wales had been right in granting an injunction to restrain the officers of the legislature from presenting the Bill for assent. In South Africa it has been held that, even in the case of a Bill not passed in accordance with the law,[2] a court should not interfere to prevent an officer of the legislature from carrying out the duty imposed upon him by the rules of procedure of the legislature of which he is an officer.[3]

[1] *Attorney-General for New South Wales* v. *Trethowan*, [1932] A.C. 526.

[2] By section 152 of the South Africa Act, 1909, certain legislation may only be passed by a two-thirds majority at a special sitting of both Houses of the legislature; see p. 382, *post*. There is no provision for holding a joint sitting for any other purpose.

[3] *Masai* v. *Jansen N.O.*, [1936] C.P.D. 361. See "Injunction, Parliamentary Process and the Restriction of Parliamentary Competence," by Geoffrey Sawyer, 60 *L.Q.R.*, p. 83, and note in 60 *L.Q.R.*, p. 226.

Imperial Conferences.

During the latter half of the nineteenth century the Dominions attained nationhood rapidly. Since 1887 there have been periodic conferences for the purpose of consultation between the Governments of the Commonwealth. They are conferences of Governments, meeting under the chairmanship of the Prime Minister of the United Kingdom, not of delegates with power to commit their respective Parliaments. These conferences were first named Imperial Conferences in 1907, when the term, Dominion, was first used in its present sense as opposed to the term, colony. At the Imperial Conference of 1926 it was realised that political reality had outgrown legal status. The Dominions had obtained, as a result of the Imperial Conference, 1923, the right to make separate treaties with foreign powers in the name of the Crown without the participation of the Imperial Government or Parliament, except that a United Kingdom Secretary of State had to take part in the affixing of the Great Seal to the formal instruments for the grant of full powers and of ratification. The right of separate diplomatic representation had been conceded. The Dominions had complete internal freedom from interference; they were (with the exception of Newfoundland) separate members of the League of Nations; and they had taken their place as equals at the Congress of Versailles held at the close of the First World War, in which they had participated. A conference was called to consider how far legal powers should be changed, and brought into line with existing facts. Before considering the recommendations of that conference [1] which resulted in the passing of the Statute of Westminster, 1931, it is convenient to examine the legal limitations upon Dominion autonomy which existed before the passing of that statute, but these limitations cannot properly be appreciated without some outline of the nature of the Dominion constitutions.

A.

Dominion Constitutions.

Dominion of Canada.

The Dominion of Canada [2] is a federation of nine Provinces. The constitution is based upon the British North America Act, 1867, as amended by subsequent Acts of the Imperial Parliament. This Act formed a federation of the self-governing colonies of Canada (Ontario and Quebec), Nova Scotia and New Brunswick. The other Provinces were added later in accordance with the provisions of the British North America Act, 1867.

[1] *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation*, 1930 (Cmd. 3479),

[2] For the Canadian Constitution, see W. P. M. Kennedy, *The Constitution of Canada* (Clarendon Press).

Federation.

Federation pre-supposes a desire for some form of union among independent states, which, though they desire union for certain purposes, nevertheless wish to preserve their identity and some measure of independence. It follows that a federal constitution must be to a large degree a rigid constitution. There must be a distribution of powers between the federal government and the governments of the several states forming the federation. If constitutional amendments could be made without the consent of the federating states, there would be no safeguard for the preservation of state rights. Thus the legislature of a federation cannot be supreme in the sense that the Parliament of the United Kingdom possesses supremacy.[1] There must be special machinery for constitutional changes, and there must be some authority, normally the courts of law, which can prevent the federal and state governments from encroaching upon each other's powers, and can declare legislation void on the ground of excess of powers.

Safeguards of Federation.

Just as the Supreme Court is the great safeguard of the constitution in the United States, so the Supreme Court safeguards federalism in Canada. There is in Canada a further safeguard in the appeal from the Canadian courts to the Judicial Committee of the Privy Council,[2] whose decisions have been authoritative in interpreting the provisions of the constitution relating to the respective powers of the Dominion and the Provinces. Further, the Canadian constitution is based upon Acts of the Imperial Parliament and can only be amended by that legislature, so that any *ultra vires* legislation by either the Dominion or the Provinces would be held by the courts to be invalid as conflicting with Acts of the Imperial Parliament. Such external safeguards are not, however, necessary to federation. In the Commonwealth of Australia they do not exist. The Commonwealth constitution can be amended without any intervention on the part of the Imperial Parliament,[3] nor on certain constitutional matters is there any appeal from the High Court of Australia to the Judicial Committee of the Privy Council, except by leave of the High Court itself.

Canada; Dominion Executive and Legislature.

Executive power in the Dominion of Canada is vested in the Governor-General as the King's representative, advised by a Privy Council. In Canada, as in all the Dominions, except Eire, responsible government rests almost wholly upon convention. The

[1] Part II., Chap. 2.

[2] Chap. 5, *post.*

[3] For an amendment tending towards centralisation, see *New South Wales* v. *The Commonwealth* (1932), 46 C.L.R. 185, and 49 *L.Q.R.*, p. 329. The amendment, enacted by the Commonwealth Parliament in 1929 (section 105A of the Commonwealth Act, 1900), empowered the Commonwealth to make agreements with the States with respect to the public debts of the States, and authorised that Parliament to make laws for the carrying out by the parties (whether the Commonwealth or the States) of any such agreement.

Governor-General acts on the advice of those members of the Privy Council who form the Cabinet and enjoy the confidence of the House of Commons. The Canadian constitution reconciles federalism with cabinet government. It is the practice to divide cabinet posts amongst representatives of the different Provinces. Legislative power is vested in the Governor-General, a Senate of members nominated for life by the Governor-General (on the advice of the Cabinet), and an elected House of Commons. In the Senate there are twenty-four members for each of four territorial divisions, Ontario, Quebec, the Maritime Provinces and Prince Edward Island, and the Western Provinces. There is no provision for avoiding a deadlock between the two chambers, except that the Governor-General may add to the Senate four or eight members representing equally the above four territorial divisions. Such provision should be contrasted with the royal prerogative to create an unlimited number of new peers in the United Kingdom.[1] The House of Commons is composed of members elected for each Province in accordance with its population, except that there is a fixed number for Quebec. Representation is adjusted after a triennial census.

The Provinces.

The nine Provinces all enjoy responsible government. Executive power is vested in a Lieutenant-Governor, who is appointed by the Governor-General of Canada on the advice of the Dominion Government and is dismissible by the Governor-General, and an Executive Council. The Lieutenant-Governor represents the Crown, and exercises prerogative powers in relation to the Province: *Liquidators of Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437; K. & L. 458. Provincial legislatures have the power of constitutional amendment, save that such amendment must not affect the office of Lieutenant-Governor. The Governor-General of the Dominion has the right to disallow provincial legislation, acting on the advice of the Dominion Government. The main reason for disallowance is that a Province has clearly exceeded its powers. This is more properly a matter for judicial decision and there tends to be a lessening use of the power to disallow. A provincial statute may, however, also be disallowed on grounds of inequality and injustice.[2] A provincial legislature is not a delegate either of the Imperial or the Dominion Parliament, but is supreme in its own sphere: *Hodge* v. *The Queen* (1883), 9 App. Cas. 117. Since the passing of the Statute of Westminster, 1931, provincial legislation is not subject to the provisions of the Colonial Laws Validity Act, 1865.

Distribution of Powers.

Certain specific powers are by section 92 of the British North

[1] Part III., Chap. 1, A.

[2] *Report of Royal Commission on Dominion and Provincial Relations* (Ottawa, 1940), Book I., p. 254.

America Act, 1867, assigned exclusively to the Provinces. The Dominion has by section 91 a general authority to legislate on all matters not exclusively assigned to the Provinces, and in addition exclusive authority over certain specific enumerated subjects. The making of criminal law and the regulation of criminal procedure are assigned to the Dominion, but to the Provinces are assigned the constitution and organisation of provincial courts, both civil and criminal, which administer both dominion and provincial law. Appeals in civil causes from provincial courts lie, at the option of litigants, either to the Supreme Court of Canada or to the Judicial Committee of the Privy Council.[1] The Governor-General may obtain an opinion of law or fact from the Supreme Court. There is no appeal in criminal causes to the Judicial Committee, the right to grant special leave to appeal having been abolished by the Criminal Code Amendment Act, 1933, of the Dominion Parliament.

Constitutional Amendment.

The constitution of the Dominion, being contained in an Act of the Imperial Parliament which contains no provisions for amendment, can only be amended by an Act of the Imperial Parliament. Such an Act is always passed at the request of both Houses of the Dominion Parliament,[2] *e.g.* when during the First World War the Dominion Government wished to prolong the duration of Parliament, there was passed the British North America Act, 1916, and the British North America Act, 1930, restored their natural resources to the Western Provinces. The British North America Act, 1940, gave to the Dominion power to regulate unemployment insurance,[3] and the British North America Act, 1943, postponed the necessity of re-adjusting provincial representation in the House of Commons in accordance with the latest census as was required by the constitution.

Commonwealth of Australia.

The Commonwealth of Australia is a federation of six self-governing States formed by the Commonwealth of Australia Constitution Act, 1900. Executive power is vested in a Governor-General advised by an Executive Council. In fact, the Cabinet constitutes the Executive Council; there is not as in the United Kingdom and Canada a formal Privy Council distinct from the Cabinet. Legislative power is vested in a Senate with an equal number of members for each State and a House of Representatives. The Senate consists of six members elected by the electors of each

[1] Chap. 5, *post.*

[2] Such a request would probably now be held to require the concurrence of the Provinces; see Imperial Conference, 1930, *Summary of Proceedings*, Cmd. 3717, p. 18, and Canada, *House of Commons Debates*, June 30, 1931. See, however, *The Statute of Westminster and Dominion Status*, by K. C. Wheare (Clarendon Press), pp. 177 ff.

[3] Passed on the recommendation of a Royal Commission on dominion-provincial relations which was appointed by the Dominion Government in 1937 and reported in 1940; see p. 376, note 2, *ante.*

State. The House of Representatives is elected on a population basis; the number of representatives chosen by the electors of each State depending upon the population of the State. Voting and registration are compulsory. Thus the Senate, as in the United States, represents State rights, a State with a small population having equal membership with a State with a large population. In the event of a deadlock between the two Houses, the Governor-General may after a fixed interval simultaneously dissolve both Houses, and, if after dissolution a similar deadlock occurs, may convene a joint sitting, at which a law may be passed by an absolute majority.

The States.

The States all enjoy responsible government. Their constitutions, unlike those of the Canadian Provinces, were not remodelled at the time of federation. Executive power is vested in Governors advised by Councils. In contrast to Lieutenant-Governors in Canada, State Governors are appointed by the Crown and hitherto have been appointed on the advice of the Imperial Government. In similar contrast there are direct relations between the States and the Imperial Government in relation to the disallowance and reservation of legislation. If the dismissal of Mr. Lang, the State Premier, by the Governor of New South Wales in 1932 was constitutional, it would appear that a State Governor has wider constitutional powers than those of a Governor-General of a Dominion. Mr. Lang's Ministry commanded a majority in the Lower House, but was dismissed on the grounds that it was instructing officials to break the law. The States are subject to the provisions of the Colonial Laws Validity Act, 1865.[1]

Distribution of Powers.

The States possess all the powers that they possessed at the time of federation, except those exclusively assigned to the Commonwealth. State powers cover most matters which concern the ordinary well-being of the citizen.[2] The Commonwealth possesses only those powers assigned to it by the constitution. Some of the assigned subjects were not within the powers of the States at the time of federation, but where the States had power, that power remains concurrent with that of the Commonwealth, unless the subject of the power is expressed to be exclusively assigned to the Commonwealth. Where, however, on a subject of concurrent powers, a State law is inconsistent with a Commonwealth law, the latter prevails. The State courts exercise both federal and State jurisdiction, except that State Supreme Courts have no jurisdiction over disputes as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se*

[1] P. 373, *ante*.

[2] H. V. Evatt, "Constitutional Interpretation in Australia," 3 *Toronto Law Journal*, p. 1.

of the constitutional powers of any two or more States.[1] An appeal lies from the State Supreme Courts either to the High Court of Australia or to the Judicial Committee of the Privy Council.[2] The High Court of Australia possesses appellate jurisdiction and also an original federal jurisdiction.

Constitutional Amendment.

The constitution of the Commonwealth is contained in the Schedule to the Commonwealth of Australia Constitution Act, 1900, and may be amended by a law which has received the approval on a referendum of a majority of all the voters in the Commonwealth and of a majority of electors in a majority of the States. It will be seen that by this procedure the constitution may be altered to the disadvantage of a State without the consent of that State, but no alteration may be made affecting the proportionate representation of a State in either House of Parliament, or altering the boundaries of a State, without the consent of a majority of the electors in that State. There is no provision enabling the amendment of sections 1 to 8 of the Constitution Act which establish the federation, and therefore without an Act of the Imperial Parliament it would be impossible legally to abolish the federation.[3] While the constitution, and even the machinery for amendment of the constitution, may be altered by the provisions of the constitution, the federal basis must be observed.[4]

Instrumentalities; Australia.

It will be convenient at this point to refer to the doctrine of instrumentalities in its application to both the federal Dominions. In the United States of America it has been laid down that there may be no interference by the federal Government with state instrumentalities—the organs of the state Governments—and no interference by the States with federal instrumentalities, *e.g.* that a State may not tax the salary of a federal officer. No such general principle of interpretation is adopted by the courts of the British Commonwealth, but in each case of conflict the point decided is whether or not the power claimed is granted by the constitution. The established courts of justice, when a question arises whether the limits prescribed under a constitution have been exceeded, must of necessity determine that question; and the only way in which they can properly do so is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is within the

[1] This limitation does not exclude jurisdiction over a dispute as to the powers of a particular State on a subject over which neither Commonwealth nor States have power, or over which the jurisdiction of the Commonwealth is undisputed and only the State's power is in question: *James* v. *Cowan*, [1932] A.C. 542.

[2] Chap. 5.

[3] A contrary view is taken by W. Anstey Wynes, *Legislative and Executive Powers in Australia* (Law Book Co. of Australasia), at p. 364.

[4] Pp. 390 and 396, *post*.

general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any court of justice to enquire further, or to enlarge constructively those conditions and restrictions: *James* v. *Commonwealth of Australia*, [1936] A.C. 578, in which the Privy Council held that the Dried Fruits Act, 1928–35, of the Commonwealth Parliament was invalid as contravening section 92 of the Australian Constitution. This section declares that inter-state trade shall be free and thus the Commonwealth is bound equally with the States not to impose restrictions by legislation or executive action. At one time the High Court of Australia adopted American principles of interpretation and was prepared to reject as unconstitutional laws which were valid if the constitution was interpreted in accordance with ordinary principles of statutory interpretation. This method of interpretation was, however, disapproved in the famous Engineers Case, *Amalgamated Society of Engineers* v. *Adelaide Steamship Company Ltd.* (1920), 28 C.L.R. 129; J. & Y. 249,[1] in which the High Court rejected the doctrine of the immunity of the Commonwealth and of the States from undue interference on the part of the other, and held that the power of the Commonwealth as to industrial disputes included in the natural meanings of the words disputes to which the Government of a State was party.

Canada.

The strict statutory interpretation of federal constitutions has, especially in Canada, rendered it difficult for the federal Government to secure the enactment of national legislation required by the needs of a great nation under modern conditions. Thus the Privy Council has been compelled to hold that without provincial concurrence the Dominion Parliament has no power to pass the necessary legislation to implement an international convention regulating hours of work,[2] or to establish a nation wide scheme of social insurance.[3] The decisions have aroused criticism of the right of appeal from the Supreme Court of Canada to the Judicial Committee. It is unfortunate that, though the decisions just mentioned may be legally correct, it is easy to point to inconsistency of principle in the numerous decisions of the Judicial Committee on the respective powers of the dominion and provincial legislatures.[4]

[1] See W. A. Holman, "Constitutional Relations in Australia," 46 *L.Q.R.*, p. 502; W. A. Wynes, *op. cit.*; H. V. Evatt, "Constitutional Interpretation in Australia," 3 *Toronto Law Journal*, p. 1.

[2] *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C. 326 (No. 1).

[3] *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C. 355 (No. 2). This decision was in effect reversed by the British North America Act, 1940; see p. 377, *ante*.

[4] See special Constitutional Number, 15 *Canadian Bar Review*, No. 6, June 1937; W. I. Jennings, "Constitutional Interpretation—the Experience of Canada," 51 *Harvard Law Review*, p. 1; Vincent C. MacDonald, "Judicial Interpretation of the Canadian Constitution," 1 *Toronto Law Journal*, p. 284.

Contrast of interpretation.

The problem of interpretation is easier in Australia, for, whereas in Canada the problem is one of classifying disputed legislation under two stated heads of power,[1] in Australia the task is essentially different.[2] The question is still one of construction; but it is the construction of one of forty-two express powers conferred upon the Commonwealth by sections 51 and 52 of the constitution and, so long as its legislation is truly referable to any one of those powers, the fact that it is also referable to subject-matters not therein included is irrelevant; nor is the fact that legislation or executive power of a State may be affected.[3] The onus is upon the Commonwealth to point to a grant of power in the constitution which will support an enactment.[4] It follows as a corollary that those who impugn the enactment must point to some express limitation upon the power established. The legislative powers of the States are only exclusive in respect of matters not covered by the specific enumeration of powers of the Commonwealth.

Commonwealth and external affairs.

In the Commonwealth the legislative power over external affairs is interpreted as extending to agreements entered into by Australia on its own international responsibility, whether imperial, inter-dominion or foreign: *The King* v. *Burgess* (1936), 55 C.L.R. 608, where the validity of the Air Navigation Act, 1920, which carried into effect an international convention, was upheld, despite the effect it might have upon the right of a State to control transport within its borders. This right of control is unimpaired in relation to civil aviation in general.[5]

Commonwealth and taxation.

During the Second World War the Commonwealth passed four laws which in effect made it impossible for the States to continue to levy income tax. It was held by the High Court that the Commonwealth has power to make commonwealth taxation effective by giving priority to the liability to pay such taxation over the liability to pay State taxation. Moreover, the Commonwealth in the exercise of its power to make laws with regard to the naval and military defence of the Commonwealth could for the duration of the war take over from the States their officers, equipment and premises concerned with the collection of taxes. It was further legal for the Commonwealth to make grants dependent upon abstention by the States from collecting income tax.[6]

Extension of Commonwealth Powers.

During the Second World War an attempt was made to secure very wide powers for the Commonwealth with a view to post-war reconstruction. After prolonged negotiations with the States which

[1] P. 377, *ante*.
[2] P. 378, *ante*.
[3] *Huddart Parker* v. *The Commonwealth* (1931), 44 C.L.R. 492.
[4] W. Anstey Wynes, *op. cit.*, p. 26.
[5] Evatt, *op. cit.*, 3 *Toronto Law Journal*, pp. 12–13.
[6] *South Australia* v. *The Commonwealth* (1942), 65 C.L.R. 673.

started in October 1942 and the holding of a constitutional convention, at which there were represented the Governments and the opposition parties of both Commonwealth and States, a Bill was in 1944 submitted to the electors on a referendum,[1] but was rejected. The Bill would have conferred upon the Commonwealth full powers on fourteen diverse subjects, including employment, agricultural marketing trusts, national works, overseas exchange, social security, air transport and national health. The new powers would have been conferred for a period of five years after the conclusion of hostilities when it was intended that a new constitutional convention should be held.

Union of South Africa.

The Union of South Africa has a unitary constitution.[2] Executive power is vested in a Governor-General advised by an Executive Council. Legislative power is vested in the Senate and the House of Assembly. Eight senators are elected by both Houses (acting jointly) of each of the four provincial legislatures, and the Governor-General in Council appoints eight senators, half of whom are selected on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa. The House of Assembly is chosen by direct election of the electors of the Union. In the event of a deadlock between the two Houses a joint sitting may during the second session, or in relation to an appropriation Bill during the same session, be convened by the Governor-General and pass a Bill by a simple majority of both Houses.

Provinces.

Each Province has a chief executive officer styled an Administrator, and each Province has a provincial council. Each provincial council elects an executive committee. Certain distinct heads of legislative power are granted to the provincial councils and further powers may be specially delegated to them by the Union Parliament. Provincial powers within the limits of provincial jurisdiction are plenary and absolute. Provincial ordinances require, however, the assent of the Governor-General in Council; and any provincial ordinance is void if repugnant to an Act of the Union Parliament. Under the South Africa Act Amendment Act, 1934 (of the Union Parliament), Parliament shall not abolish any provincial council or abridge the powers conferred on provincial councils under the South Africa Act, 1909, except by petition to Parliament by the provincial council concerned. This Act could itself be repealed at any time by the Union Parliament.

"Entrenched" Provisions.

By the South Africa Act, 1909, the Union of South Africa possesses full powers of constitutional amendment, though for certain

[1] P. 379, *ante*.

[2] W. P. M. Kennedy and H. J. Schlosberg, *Law and Custom of the South African Constitution* (Clarendon Press), 1935.

amendments (official language, franchise) the special procedure of a two-thirds majority at a special sitting of both Houses of the legislature is necessary.[1] The provisions of the constitution which require special machinery for amendment are known as the entrenched provisions and by constitutional convention these provisions cannot be abolished without the employment of the special machinery. The Statute of Westminster, 1931, did not affect this South African convention. The prescribed procedure was followed in 1936 when there was passed the Representation of the Natives Act which altered the electoral qualification in the Cape Province. The Supreme Court of South Africa has, however, held that as long as an Act has been passed by the two Houses and has received the royal assent its validity cannot be questioned in any court on the ground that prescribed procedure has not been followed.[2]

Sovereignty of Union Parliament.

Under the Status of the Union Act, 1934, passed by the Union Parliament to implement the Statute of Westminster, legislative sovereignty is declared to be vested in the Union Parliament alone. Section 2 of the Act provides that no Act of the United Kingdom Parliament passed after December 11, 1931, shall extend to the Union as part of the law of the Union, unless extended thereto by an Act of the Union Parliament. The Royal Executive Functions and Seals Act, 1934, also a Union Act, accords to the Governor-General the power to exercise any royal function in respect of both internal and external affairs on the advice of the Ministry without royal approval. Provision is made by section 151 of the South Africa Act, 1909, for the transfer to South Africa with the consent of the King in Council of Bechuanaland, Basutoland and Swaziland. It is agreed by South Africa that such a transfer still requires the consent of the United Kingdom Government.

New Zealand.

New Zealand has a unitary constitution with a bicameral legislature, the General Assembly, consisting of an elected House of Representatives and a nominated upper house called the Legislative Council. The Executive Council of nine members responsible to the legislature consists of members of the Cabinet. Specific powers of constitutional amendment were conferred by the Imperial Acts establishing the constitution and it is not clear whether the specific powers were enlarged by the general words of section 5 of the Colonial Laws Validity Act, 1865.[3] The Statute of Westminster, 1931, does not confer any new power to amend the New Zealand constitution.

[1] South Africa Act, 1909, s. 152.
[2] *Ndlwana* v. *Hofmeyer*, [1937] A.D. 229.
[3] Pp. 373, *ante*. *Report of the Conference on the Operation of Dominion Legislation*, 1930, Cmd. 3479, and K. C. Wheare, *op. cit.*, pp. 229 ff.

The Irish Free State: the Irish Treaty.

The Irish Free State (now Eire) came into being as the result of "Articles of Agreement for a Treaty between Great Britain and Ireland" in 1921. Up to that date Ireland had been since the Act of Union of 1800 part of the United Kingdom. The Articles of Agreement received statutory effect in the Irish Free State (Agreement) Act, 1922, and the resulting Constitution was enacted by the Irish Free State (Constitution) Act, 1922, of the Parliament of the United Kingdom and the Constitution of the Irish Free State (Saorstat Eireann) Act, 1922, passed by the Irish Free State Assembly. The treaty provided that, subject to its express terms, the position of the Irish Free State in relation to the Imperial Parliament and Government, and otherwise, should be that of the Dominion of Canada and that the law, practice and constitutional usage governing the relationship of the Crown, or the representative of the Crown, and of the Imperial Parliament to the Dominion of Canada should govern their relationship to the Irish Free State. It further provided for the grant of certain facilities in Ireland to the naval and military forces of the United Kingdom. These facilities were abandoned by agreement confirmed by an imperial Act: Eire (Confirmation of Agreements) Act, 1938. The requirement of the taking of an oath of allegiance by members of the Legislature was abolished in 1933. The constitution was to be construed with reference to the treaty, and in the event of inconsistency the treaty was to prevail. This provision was also repealed in 1933 by the Free State Legislature which thus took power to legislate contrary to the terms of the treaty.

Constitution of Eire.

The present constitution of Eire came into operation in December, 1937. The office of Governor-General was abolished and he was replaced by a President. The President is elected by direct popular vote by proportional representation and holds office for seven years. Legislative power is vested in a National Parliament known as the Oireachtas consisting of two Houses, a Senate (Seanad Eireann) and a House of Representatives (Dail Eireann). The Senate has a very limited suspensory veto only. Executive power is vested in the Government at the head of which is the Prime Minister who is chosen by Dail Eireann. The Government is expressly made responsible to the Dail by the constitution. There is a Council of State which consists of certain high officers and ex-officers of State to advise the President in the exercise of his functions. Executive authority in regard to external affairs is to be exercised by or on the authority of the Government.

Newfoundland.

By the Newfoundland Act, 1933, passed by the Imperial Parliament as the result of addresses from the Newfoundland legislature, the constitution of Newfoundland, which was contained in letters patent and instructions to the Governor, was suspended. Up to

this time Newfoundland had been since 1855 a self-governing colony, though unlike the other Dominions its constitution had never been embodied in an Act of the Imperial Parliament. The powers both of legislation and of executive government are exercised by the Governor aided by a commission of six members—three Newfoundlanders, chosen by the United Kingdom Government, but paid by Newfoundland, three from the United Kingdom and paid by the United Kingdom Government. In executive matters the Commissioners advise the Governor, who may override their views, subject to the control of the Secretary of State for Dominion Affairs. Legislation is enacted by the Governor together with the Commissioners, whom he is not allowed to override. Legislation may be disallowed by the King in Council. The change was the result of grave financial crisis in Newfoundland requiring aid from the United Kingdom. The three United Kingdom members of the Commission control the financial departments.[1]

B.

The Statute of Westminster, 1931.

Limitations upon Dominion Autonomy.

There were, before the passing of the Statute of Westminster, 1931, the following limitations upon the legislative autonomy of the Dominions which were considered and reported upon by the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929.[2] It is important to remember that the Statute of Westminster is concerned only with legislative powers. Changes in, *e.g.* the exercise of functions and the status of Governors-General, were made by executive action following declarations of policy made at Imperial Conferences.

Disallowance.

(*a*) There still existed the power of disallowance, but this power had become obsolete. It had not been exercised in relation to Canadian legislation since 1873, and never in relation to South Africa or New Zealand. But admission to the list of trustee securities in the United Kingdom is, under the Colonial Stock Act, 1900, given to dominion securities provided that the Dominion concerned consents to the disallowance of any legislation affecting such admitted stocks. The Conference for this reason did not recommend the abolition by imperial legislation of the power of disallowance, but suggested that it should be left to the Dominions either to abolish the power by constitutional amendment, or, where an imperial Act is required for such amendment, as in the case of

[1] For a full account of the position, see Keith in *J.C.L.*, 3rd Series, Vol. XVI., Part. I.

[2] 1930, Cmd. 3479; p. 383, *ante*.

Canada, to request the passing of such Act. South Africa abolished the power of disallowance in 1934. The other Dominions concerned have taken no steps. By the Colonial Stock Act, 1934, of the Imperial Parliament, there may be substituted an undertaking by a Dominion Government that legislation affecting the existing rights of stockholders shall not be submitted for the royal assent except by agreement with the Government of the United Kingdom. This safeguards the rights of investors in lieu of the protection afforded by the power of disallowance.

Reservation.

(*b*) There still existed the Governor-General's discretionary power to reserve Bills, and also constitutional provisions requiring the reservation of Bills dealing with particular subjects and provisions requiring reservation in certain imperial statutes, *e.g.* the Merchant Shipping Acts.[1] The Imperial Conference of 1926 [2] had placed it upon record that it is recognised that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs, and that consequently it would not be constitutional for the Government of the United Kingdom to advise the King upon any matter relating to a Dominion against the views of the Government of that Dominion. It was, therefore, recommended that, as in the case of disallowance, it should be left to each Dominion to take such steps as it should desire to abolish both discretionary and compulsory reservation. The Irish Free State consequently abolished reservation by the Constitution (Amendment No. 21) Act, 1933. In regard to South Africa the Status of the Union Act, 1934, has abolished discretionary reservation. Compulsory reservation is retained in respect of Bills limiting the right to request special leave to appeal to the Privy Council and Bills altering the terms of the Schedule to the South Africa Act, 1909, in regard to the transfer of native territory to the Union. Assent to such Bills would be given or withheld on the advice of South African Ministers.[3]

Repugnancy.

(*c*) Under the provisions of the Colonial Laws Validity Act, 1865,[4] dominion legislation would be held void if repugnant to an Act of the Imperial Parliament applying to such Dominion.[5] The Conference recommended that this Act should cease to apply to the Dominions which would thus secure the power to amend any such Acts. Examples of such Acts are Acts of the Imperial Parliament relating to fugitive offenders, extradition, foreign enlistment, *e.g.* Extradition Act, 1870, and Fugitive Offenders Act, 1881.

[1] See *Report of Conference on the Operation of Dominion Legislation*, p. 13.
[2] *Summary of Proceedings*, p. 17.
[3] As to native territories, see p. 368, *ante*.
[4] P. 373, *ante*.
[5] *Nadan* v. *The King*, [1926] A.C. 482; K. & L. 442.

Extra-Territorial Legislation.

(*d*) The Dominions had no general power to pass legislation taking effect outside their own territories, *e.g.* to punish crimes committed abroad.[1] The extent of this limitation was difficult to define,[2] but it was of grave inconvenience in relation not only to criminal law, but, *e.g.* to the control of dominion forces abroad. The Conference recommended the abolition of this limitation. A Dominion and probably also a Colony may—apart from the Statute of Westminster—pass legislation having extra-territorial operation where such is necessary to give effect to enactments which are within the competence of the Dominion as being for the peace, order and good government of the Dominion: *Croft* v. *Dunphy*, [1933] A.C. 156. It has been suggested—and the point is still of importance in regard to the Australian States and New Zealand, which has not adopted the Statute of Westminster—that the test is whether the law in question does not, in some aspects and relations, bear upon the peace, order and good government of the Dominion either generally or in respect to specific subjects: *Trustee Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1933), 49 C.L.R. 220; J. & Y. 90.

Power of Imperial Parliament to legislate for Dominions.

(*e*) The Imperial Parliament still had legal power to legislate for the Dominions. In fact, this power was by constitutional usage only exercised at the request and with the consent of the Dominions, and the Conference recommended that the constitutional convention should receive legislative recognition.

Limitations upon Constitutional Amendment.

(*f*) The Constitution of Canada could, as we have seen, only be amended by an Act of the Imperial Parliament, and an Act of the Imperial Parliament was also necessary for the amendment of sections 1 to 8 of the Commonwealth of Australia Constitution Act, 1900. Any enlargement of the powers of Canada or Australia in this respect would affect both the Provinces and States as well as the Dominion and Commonwealth, and the Conference made no positive recommendations upon this matter.

The Statute of Westminster, 1931.

The recommendations of the Conference were with minor modifications adopted by the Imperial Conference of 1930,[3] and they were given legal effect by the passing of the Statute of Westminster, 1931, by the Imperial Parliament on December 11, 1931.

Preamble; Succession, etc.

The preamble to the Statute affirms the free association of the members of the British Commonwealth of Nations united by a common allegiance to the Crown, and records that it would be in accord with the established constitutional position that any alteration in the law touching the succession to the throne or the royal style

[1] *In re Criminal Code Bigamy Sections, Canada* (1897), 27 S.C.R. 461.
[2] See J. & Y., *op. cit.*, pp. 34–35.
[3] *Summary of Proceedings*, pp. 17–21, 1930, Cmd. 3717.

and titles should hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.[1] The preamble further sets out, in addition to a similar provision made in section 4 of the Statute itself, that it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the Dominions otherwise than at the request of and with the consent of that Dominion. Section 4 requires an express declaration in the Imperial Act that the Dominion has requested and consented to the enactment thereof. On the abdication of Edward VIII. in 1936 the request and consent of Canada were recited in the preamble to His Majesty's Declaration of Abdication Act, 1936, passed on December 11, 1936, and the assent of the Dominion Parliament was signified when Parliament re-assembled early in 1937 by the passing of an Act of Assent. Australia had not at that date adopted the Statute of Westminster, so convention only, not strict law, had to be considered. A resolution of the Commonwealth Parliament was passed on the same day and before the Imperial Act was passed, and the assent of the Commonwealth of Australia and of New Zealand and South Africa was referred to in the Imperial Act. The Government of New Zealand requested the passing of the Imperial Act and the assent of the New Zealand Parliament was subsequently given. The South African Government took the view that the throne was vacated by Edward VIII. immediately he signed the Instrument of Abdication on December 10, and therefore George VI. was King in South Africa before the passing of the United Kingdom Abdication Act on December 11. The Status of the Union Act, 1934, provided (section 5) that the heirs and successors of the Crown mean His Majesty's heirs and successors in the sovereignty of the United Kingdom as determined by the laws relating to the succession of the Crown of the United Kingdom. By an Act passed in 1937, His Majesty King Edward the Eighth's Abdication Act, 1937, the Union Parliament recorded its assent to the alterations in the law touching the succession to the throne and reaffirmed that George VI. had been King since December 10, 1936.[2] The Irish Free State provided by the Executive Authority (External Relations) Act, 1936, passed on December 12, that Edward VIII.'s abdication should take effect immediately upon the passing of the Act. The Irish Free State had thus, like South Africa, for the space of part at least of one day, a different sovereign from the rest of the British Commonwealth.

[1] P. 119, *ante*.

[2] For a very full study of this complicated subject, see "The Abdication Legislation in the United Kingdom and in the Dominions," by K. H. Bailey, *Politica*, Vol. III., pp. 1–26, 97–117.

In the operative part of the Statute of Westminster it was enacted:

Colonial Laws Validity Act, 1865. Statute of Westminster, 1931, s. 2.

(*a*) That the Colonial Laws Validity Act, 1865, should cease to apply to the Dominions or to the Provinces of Canada; that the Dominions and the Provinces of Canada should have power to repeal or amend Acts of the Imperial Parliament in so far as they form part of the law of that Dominion; and that no law of either a Dominion or a Province of Canada should be void on the ground of repugnancy to an Act of the Imperial Parliament or to the law of England. Canada by statute gave extra-territorial operation to all statutes passed before December 11, 1931, which by their terms or by necessary implication were intended to have such operation. It was argued [1] that section 2 of the Statute of Westminster did not enable a Dominion to exercise powers, *e.g.* of constitutional amendment, which it could not exercise under the original Act which enacted its powers. It was suggested that section 2 merely removed the restriction of repugnancy to an Act of the Imperial Parliament and did not enlarge the ambit of the powers of a Dominion Parliament. The Privy Council, however, held [2] that by section 2 a Dominion Parliament was given full legislative powers, save in so far as such powers were restricted by subsequent sections of the Statute of Westminster itself. It is probable that the Statute itself cannot be amended by the Parliament of a Dominion.

Royal Prerogative.

It has been argued [3] that in the absence of express words the Statute of Westminster does not enable a Dominion to legislate so as to affect the royal prerogative. Though the decision is based also on other grounds, the Privy Council appears clearly to have held that a Dominion may now legislate so as to affect the prerogative in regard to the Dominion: *British Coal Corporation* v. *The King*, [1935] A.C. 500, at p. 518.

Extra-Territorial Legislation. Statute of Westminster, 1931, s. 3.

(*b*) That the Dominion Parliaments shall have full power to make laws having extra-territorial operation.[4]

There still remains a difficulty in that no such power is given to the Provinces of Canada or States of Australia, although criminal law is in general within the powers of the States and accordingly there is difficulty in providing for the punishment of offenders who have committed offences outside a State's jurisdiction.[5]

Legislation by the Imperial Parliament. Statute of Westminster, 1931, s. 4.

(*c*) That no Act of Parliament of the United Kingdom passed after the commencement of the Statute of Westminster shall extend

[1] K. C. Wheare, *op. cit.*, at p. 180 *et seq.*
[2] *Moore* v. *Attorney-General of Irish Free State*, [1935] A.C. 484.
[3] W. Anstey Wynes, *op. cit.*, p. 365.
[4] In *Croft* v. *Dunphy*, [1933] A.C. 156, the Judicial Committee refused to decide whether this provision was retrospective.
[5] Cf. *Macleod* v. *Attorney-General of New South Wales*, [1891] A.C. 455; K. & L. 414.

to a Dominion as part of the law of that Dominion, unless it is expressly declared that that Dominion has requested, and consented to, the enactment thereof. It is not clear how far the word, Dominion, should here be interpreted territorially, *i.e.* whether the Imperial Parliament could no longer legally legislate for the Provinces of Canada on matters within the provincial sphere. It is probable that the power no longer exists, and it is noticeable that it is expressly stated in the Statute that the power of the Imperial Parliament to legislate for the States of Australia remains (section 9), and that the exercise of such power shall not require the concurrence of the Commonwealth where before the Statute such consent would not have been required by constitutional practice. It is expressly provided by section 9 (3) of the Statute that in regard to the Commonwealth of Australia the request and consent referred to in section 4 shall mean the request and consent of both the Parliament and Government of the Commonwealth. Lord Sankey, L.C., stated in *British Coal Corporation* v. *The King*, *ante*, " it is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains unimpaired. Indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute. But that is theory and has no relation to realities." A contrary view was expressed by an eminent Australian constitutional lawyer who has said of section 4 that it " is a restriction upon British parliamentary supremacy over the law." [1] The same view has been expressed by the Supreme Court of South Africa—" freedom once conferred cannot be revoked." [2]

Status of the Union Act, 1934.

The Status of the Union Act, 1934, went even further than section 4 and by it the Union Parliament enacted that no Act of the United Kingdom Parliament passed after December 11, 1931, shall extend or be deemed to extend to the Union as part of the law of the Union, unless extended thereto by an Act of the Union Parliament. The Statute of Westminster itself has been scheduled to the Status of the Union Act, 1934, thus giving it the force of a statute of the Union Parliament.

Safeguards for State and Provincial Rights. Statute of Westminster, 1931, ss. 7, 8 and 9.

It has been shown that the giving of further powers of constitutional amendment to Canada and Australia would involve the removal of the safeguard to provincial and state rights which is afforded by the necessity of legislation by the Imperial Parliament in order to amend the Constitution of Canada or sections 1 to 8 of the Commonwealth of Australia Constitution Act, 1900. Such

[1] " The Law and the Constitution," 51 *L.Q.R.*, p. 611, by Mr. Justice Dixon; see H. V. Evatt, *The King and his Dominion Governors* (Clarendon Press), Appendix.

[2] *Ndlwana* v. *Hofmeyer*, [1937] A.D. 229, at p. 237.

additional powers would at once be given, should the Provinces or States concur in requesting them, but in the meantime the present position is preserved. It is enacted expressly (s. 7) that nothing in the Statute shall extend to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, and that the new powers conferred upon the Dominion Parliament and the provincial legislatures of Canada shall be restricted to enacting laws within their respective spheres of competence. It is further enacted (section 8) that nothing in the Statute gives any new power to alter the constitutions of the Commonwealth of Australia or New Zealand, and (section 9) that the Commonwealth is given no new power to legislate on any matter not within its authority, but within the authority of the States.

Adoption of Statute of Westminster.

It is important to notice that the substantive sections of the Statute, sections 2, 3, 4, discussed above together with 5 (Merchant Shipping), and section 6 (Courts of Admiralty) do not apply to New Zealand or Newfoundland [1] until adopted by the Parliaments of those Dominions. Since, however, they have the power at will to adopt these sections, the Statute of Westminster may be said to represent the present constitutional relationship between the Dominions and the United Kingdom. The Commonwealth Parliament by the Statute of Westminster Adoption Act, 1942, adopted the sections in question with effect from September 3, 1939.

C.

The Present Position of the Dominions.

The Imperial Parliament.

Inasmuch as the present legal status of the Dominions is without precedent, it is difficult, if not impossible, to describe it accurately. The legal supremacy of the Imperial Parliament has not been abolished in relation to the Dominions,[2] but it remains only to be exercised with their consent. The limitations that remain upon constitutional amendment are preserved only so long as the people of Canada and Australia desire their preservation.

The Crown.

The Crown remains as the one effective bond of Empire. The Crown is one and indivisible throughout the Commonwealth: *Williams* v. *Howarth*, [1905] A.C. 551 ; K. & L. 421, and it cannot be accurately stated that there remains only a personal union under the King. The position involves difficulties that can only be solved by co-operation and adjustment. It is agreed that the Crown will only be advised upon matters relating to a Dominion by the Ministers of that Dominion. It might be that the Ministers of one Dominion

[1] For present position of Newfoundland, see p. 384, *ante*.
[2] This view is not accepted in South Africa ; see pp. 37 and 390, *ante*.

would advise a course of action hostile to another Dominion of the Crown. It is no answer to this difficulty to say that the powers of the Crown in a Dominion will only be exercised by the Governor-General, and that the King himself will not receive conflicting advice. The prerogatives of declaring war and making peace have not been delegated to Governors-General.[1] There are occasions where the interests of two Dominions might be vitally concerned, where the assent of the Crown would be necessary, and where conflicting advice might be given. These are not problems that lawyers can solve.

Governors-General.

It is true, however, to say that ordinary difficulties can be avoided by the fact that the powers of the Crown are exercised by the Governors-General, who no longer in any way represent the Government of the United Kingdom. The appointment of a Governor-General is now made on the advice of the Dominion Government concerned. This change of practice first received recognition in the formal instruments when the Governor-General of Canada was appointed in 1931. It is for the Dominions to decide whether or not to continue the practice of appointing distinguished citizens from the United Kingdom. Australia and the Union of South Africa have, since 1930, on occasions advised against the practice. Eire has abolished the office from its constitution.

Exercise of Prerogative of Dissolution.

It was for a long time debated how far a Governor-General could constitutionally reject the advice of his Ministers. In 1926 Lord Byng refused a dissolution to the Premier, Mr. Mackenzie King, and then granted one to his successor, Mr. Meighen. The refusal took place during the progress of a motion of censure on the Government and followed closely a previous dissolution, as a result of which the Government had failed to obtain a clear majority. The new Prime Minister was unable to avoid a defeat in the Commons. This action aroused acute controversy, and as a result the position of a Governor-General was defined by the Imperial Conference of 1926. It was laid down " that it was an essential consequence of the equality of status existing among the members of the British Commonwealth that the Governor-General of a Dominion is the representative of the Crown, holding in all respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain." [2] No clear conventions, however, regulate the constitutional duty of the King in relation to such questions as the granting of a dissolution.[3] No step has yet been taken to

[1] But as to Union of South Africa, see Status of the Union Act and Royal Executive Functions and Seals Act, passed by the Union Parliament in 1934; see pp. 37 and 390, *ante*. As to Eire, see p. 393, *post*

[2] *Summary of Proceedings*, 1926, Cmd. 2768, p. 7.

[3] H. V. Evatt, *op. cit.*

free a Governor-General from the legal liabilities of a colonial Governor.[1]

Delegation of prerogative.

It has been seen that the vital external prerogatives of declaring war and making peace and of accrediting diplomatic representatives have not been delegated to the Governor-General. Specific delegation from the Crown is required for each case, except for South Africa where the Royal Executive Functions and Seals Act, 1934, empowered the Governor-General to act on the advice of his Ministers without royal approval.[2] The Governor-General of Australia in 1941 declared war against Japan under a power specially assigned to him by the King on the exclusive advice of his Australian Ministers.[3] It may be assumed that since the Statute of Westminster, 1931, there are implicit in the office of Governor-General all such prerogatives as are necessary for the government of the Dominion concerned, while it must be left to convention to determine what prerogatives the King will still exercise in person. By the Constitution (Amendment No. 27) Act of 1936, all references to the King were deleted from the constitution of the Irish Free State. The constitution of 1937 [4] provides that the executive power in regard to external affairs shall be exercised by or on the authority of the Government. So long, however, as Eire is associated with Canada, Australia and South Africa, and so long as the King is recognised by those nations as the symbol of their co-operation, he may continue to act on behalf of Eire on the advice of the Executive Council for the appointment of diplomatic and consular representatives and the conclusion of international agreements.[5]

Communication between the Dominions and the United Kingdom.

Not only is it important to hold periodic conferences of Ministers, but provision must be made for regular representation of the Dominions in the United Kingdom. The Dominions are represented in London by High Commissioners, and the United Kingdom has appointed High Commissioners in the Dominions. The High Commissioner in the Union of South Africa also holds the separate office of High Commissioner for Basutoland, Bechuanaland Protectorate and Swaziland. For a time, in 1932 and 1933, Mr. S. M. Bruce, a former Commonwealth Prime Minister, combined membership of the Commonwealth Cabinet with the task of representing the Commonwealth in London, thus giving a Dominion Cabinet the opportunity of direct audience whenever desired with the King through one of its members. There are many channels of communication between the United Kingdom and the Dominions. Imperial conferences are held periodically and representatives of the

[1] P. 364, *ante*. See "The Imperial Conferences, 1926–1930 and the Statute of Westminster," by Professor W. P. M. Kennedy, 48 *L.Q.R.*, p. 191; and *J.C.L.*, Vol. XIV., pp. 262–63.

[2] P. 390, *ante*. [3] P. 395, *post*. [4] P. 384, *ante*.

[5] Executive Authority (External Relations) Act, 1936, (Eire).

Dominions attend the Committee of Imperial Defence.[1] During the Second World War the Prime Minister of the United Kingdom was in direct communication with Dominion Prime Ministers. There was also a daily stream of telegrams through the Dominions Office. Daily meetings of High Commissioners in London were presided over by the Secretary of State for Dominion Affairs and attended by a representative of the Foreign Office. Dominion Prime Ministers and other Ministers visited London from time to time, and Mr. Churchill visited Canada. On the occasion of his second visit in 1943 there was held a joint meeting of the Canadian War Cabinet Committee and the British War Cabinet. The Australian High Commissioner in London was given the right to attend meetings of the United Kingdom War Cabinet whenever matters of direct and immediate concern to Australia were under consideration. Finally in 1944 there was held in London a meeting of Prime Ministers attended by the Prime Ministers of the United Kingdom, Canada, Australia, New Zealand, South Africa and Southern Rhodesia and representatives of India. To meet the special needs of the Pacific there were set up Pacific War Councils in both Washington and London. Canada, Australia and New Zealand were represented on both bodies.

The Dominions and Foreign Affairs.

As was stated by the Imperial Conference of 1926 equality of status does not necessarily involve equality of function. The Dominions have the right to be separately represented abroad. The presence in the Union of foreign diplomats led to the enactment of the Union Diplomatic Immunities Act, 1932. But the Dominions, and Eire, habitually employ the consular, and in many capitals the diplomatic, service maintained by the United Kingdom, just as they rely largely upon the naval forces of the United Kingdom for defence. The Canadian Navy with its air arm was, however, increased during the Second World War so as to enable it to play a vital and substantial part in the Battle of the Atlantic as a separate fleet, and the Australian Navy played a vital part in the Pacific. Dominion Ministers may advise the Crown to exercise the prerogative power of treaty-making,[2] and thus a Dominion may make a treaty affecting that Dominion without the consent of the United Kingdom Government. Where a treaty is made in the name of the Crown on behalf of the whole Commonwealth,[3] a United Kingdom plenipotentiary signs on behalf of Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League of Nations; separate plenipotentiaries sign for each Dominion. Unless a

[1] P. 138, *ante*. [2] Part IV., Chap. 9.
[3] Imperial Conferences, 1926 and 1930, *Summaries of Proceedings*. (Cmd. 2768 and 3717).

Dominion has, as have Eire and the Union of South Africa, its own Great Seal, the formal concurrence of a United Kingdom Minister is necessary in the issuing of formal powers under the Great Seal.

The Dominions in International Law.

Inter-Imperial declarations and changes of practice do not in themselves alter international law, and cannot in themselves bind foreign States, and the position of the Dominions in international law is still not clear. The Dominions (except Newfoundland) were separate members of the League of Nations and have given separate adherence to the Permanent Court of International Justice. As between the members of the British Commonwealth it is recognised that a Dominion is not bound by a treaty made in the name of the Crown to which it has not assented and which it has not ratified. Similarly no Dominion would be regarded as under any obligation to assist in a war declared without its consent. These are matters, not of international law, but of inter-imperial relations. The Crown, however, is the formal head of the Commonwealth. The question whether it can be both at war and at peace has not yet been answered, unless the ambiguous position of Eire since 1939 can be regarded as a precedent. The fact that during the Second World War formal declarations of war were made on different dates by members of the Commonwealth does not answer the question in substance. During the Second World War Eire remained neutral. Canada did not formally declare war on Germany until seven days after the United Kingdom. On September 10, 1939, a separate formal declaration of war on Germany was made by the King on the advice of his Canadian Ministers following the acceptance by the Canadian Parliament of an address from the Throne. On September 3, 1939, Australian Ministers met in Melbourne and the Cabinet approved a notification that a state of war existed with Germany. A different procedure was followed by Australia in 1941 in declaring war against Japan. War was declared by the Governor-General under powers specially assigned to him by the King acting on the exclusive advice of the Australian Government. On September 6, 1939, the Governor-General of South Africa issued a proclamation notifying a state of war with Germany.

Secession.

The question of the right to secede must be considered as one which cannot be answered as a pure question of law. It might be argued that the Union of South Africa has complete power to amend its constitution and so can secede from the Commonwealth, but secession involves more than constitutional amendment. The whole status of the Dominions is based upon their allegiance to the Crown and membership of the Commonwealth. Apart from such membership it might be said that they have no legal status at all. A Dominion could not be prevented from seceding.

but such an act would be extra-legal. It would involve a declaration of independence and for international validity would require a treaty or some form of recognition. Viscount Caldecote, L.C.J., stated the view that the Statute of Westminster did not expressly or by implication provide for the right to secede: *Murray* v. *Parkes*, [1942] 2 K.B. 123. In a more limited sphere the question of the right of Western Australia to secede from the Commonwealth and resume its position as a unitary Dominion was considered in 1934. As the law stands, this secession could only be effected by an Act of the Imperial Parliament, even since the Commonwealth has adopted the Statute of Westminster.[1] The Imperial Parliament took the view that such a matter could only be considered on the initiative of the Commonwealth. In effect the State was told that its constitutional rights were as a matter of constitutional practice limited by the federal system.

[1] P. 390, *ante*.

CHAPTER 4.

THE INDIAN EMPIRE.

Central Government of British India.

INDIA is divided politically into British India, consisting of Governors' Provinces (together with certain areas known as Chief Commissioners' Provinces), and the Indian States, commonly known as Native States. The constitution of India at the present time is contained partly in the Government of India Act, 1919, and partly in the Government of India Act, 1935, and it is necessary to consider separately the Central Government of British India, the Provincial Governments of British India and the Indian States.

The system of government established after the Indian Mutiny vested power over India in the Secretary of State in Council who was responsible to the United Kingdom Government and Parliament. Central government in British India was entrusted to the Governor-General in Council who is not responsible to a representative legislature, but to the Secretary of State for India, a member of the United Kingdom Cabinet. The Secretary of State for India was, until the coming into operation of those parts of the Government of India Act, 1935, which are now in force, assisted by a Council of India and normally acted with the Council's concurrence, though he might disregard its advice except in regard to the expenditure of Indian revenue and certain matters relating to the Indian public services which required sanction by the Secretary of State in Council. Though the Government of India was the direct responsibility of the Imperial Government and Parliament, it was the practice not to interfere where there was agreement between the Executive and the Legislature in India. The Governor-General, commonly known as the Viceroy, is appointed by the Crown for five years, but his term of office may be prolonged. He is assisted by an Executive Council appointed by the Crown, the majority of whom are now British Indians.[1] Members of the Executive Council are in charge of the various departments of the Central Government, but are not responsible to the Legislature. The Legislature consists of the Council of State of sixty members and the Legislative Assembly of one hundred and forty members. There is a majority of elected members in each Chamber. Certain subjects, *e.g.* the defence estimates, are excluded from the vote of the Legislature. Moreover, when interests of State so demand, the Governor-General is empowered to secure on his own authority the necessary funds despite the refusal of the Legislature to vote them, and legislation may be brought into force by

[1] P. 403, *post*.

certification by the Governor-General, if rejected by the Legislature. Ordinances may in an emergency be made by the Governor-General for a limited period.

Government of India Act, 1935.

The Government of India Act, 1935, provided, subject to important safeguards, for responsible government in the Governors' Provinces of British India, and for a federation of British India and the Native States with a large measure of responsible government involving the establishment of a new Federal Legislature and a Federal Court. It is convenient to consider later the provisions of the Act which relate to federation and their origin. These provisions have not yet come into force though the provisions conferring responsible government on the Provinces took effect in April 1937. Until the establishment of the Federation, the constitution of the Central Government of India remains as laid down in the Government of India Act, 1919, subject to minor amendments. Two important changes have, however, taken effect despite the delay in effecting federation. The Council of India has been abolished and instead the Secretary of State must appoint advisers, half of whom must have held office for ten years under the Crown in India. The Federal Court has been established to perform for British India the functions which under the Act it would perform in relation to the Federation.[1]

Burma.

Burma, hitherto a province of British India, was given a separate self-governing constitution of the non-federal type by the Government of Burma Act, 1935, which came into operation in 1937. As a result of invasion the operation of the constitution had to be suspended in 1942.

Provincial Government in British India.

Advance to Responsible Government.

In 1909 the reforms associated with the names of Lord Morley as Secretary of State and Lord Minto as Governor-General provided for (1) a majority of non-officials in all Provincial Councils, (2) the election of non-official members by direct election, and (3) the right of members both to recommend and to criticise government policy by means of resolutions. The Montagu-Chelmsford reforms of 1919 introduced a small measure of responsible government by means of the system of dyarchy which, according to the Preamble of the Government of India Act, 1919, was a prelude to the gradual introduction of self-governing institutions. Reserved subjects, which included law and order, were administered by the Governor in Council responsible directly to the Governor-General. Transferred subjects were entrusted to Indian ministers responsible for their administration to provincial Legislatures. Transferred subjects included public health, public works and education. By the Government of India Act, 1935, full responsible government has been granted to the eleven Governors' Provinces. By way of

[1] P. 402, *post*.

safeguard against emergencies the Governor has certain special responsibilities which he is required to exercise at his discretion,[1] but normally the exercise of all governmental power (including law and order) is to be on the advice of Indian Ministers, members of, and responsible [2] to the Legislatures. Where the Governor acts at his discretion, he is subject to the general control of the Governor-General and must comply with any directions given to him by the Governor-General. In six of the Provinces the Legislatures are bicameral. The Act of 1935 lowered the property qualification for the franchise so as to include about 40 per cent. of the adult male population of British India and make a substantial increase in female suffrage. Provision is made for the representation of sectional minorities and special interests. Chief Commissioners' Provinces will be subject to the executive authority of the Federation when established.

The Indian States.

The Indian States are not British territory and their subjects are ruled by native Princes whose titles are hereditary. The relationship of the Crown to the States is known as Paramountcy and is based sometimes upon treaty, but mainly upon usage and sufferance and the practice adopted by the Political Department of the Government of India. Paramountcy is not identical with sovereignty which is shared between the Crown and the native ruler. Apart from express rights conferred by treaty the right of the Crown is probably confined to the general right of interference in the interest of India as a whole and includes the right to intervene in cases of gross misgovernment or to preserve the dynasty and to maintain peace. In a sense this general paramountcy may be said to be based on consent.[3] Acts of the Crown in the exercise of paramountcy are acts of State not cognisable in any British court.[4] A State normally manages its own internal affairs including the making and administration of laws for its subjects and the imposing and spending of its revenues. The Crown controls all foreign and also inter-state relations, and assumes responsibility for all British and foreign citizens. A non-Indian resident is not under the jurisdiction of the State courts. There is usually a British officer, known as a Resident or Agent, whose duty it is to offer advice to the ruler and to report to the Political Department of the Government of India.

States and Federation.

Until the Government of India Act, 1935, the Crown exercised its rights in regard to the States through the Governor-General in

[1] P. 401, *post*.

[2] There is no express provision for the responsibility of Ministers to the Legislatures. As in Great Britain, responsibility will result from the necessity of securing the co-operation of the Legislature.

[3] See *Report of Indian States Committee*, 1929, Cmd. 3302, and "The Indian States and India," by Sir William Holdsworth, 46 *L.Q.R.*, p. 407.

[4] Part IV, Chap. 9.

Council. The States, however, demanded that the rights and obligations of the Paramount Power should not be assigned to persons not under the control of the Crown. They objected to their exercise by a Federal Government in British India responsible to an Indian legislature. Accordingly the Government of India Act, 1935, while providing that the Governor-General should be the executive head of the Federation, laid it down that the relations of the Crown with the Indian States should be conducted by the "Representative for the exercise of the functions of the Crown in its relations with Indian States." The intention is that the two offices shall continue to be held by the Viceroy. None the less the accession of States to the proposed Federation would necessarily involve relations also with the Governor-General, as such, in regard to federal subjects in the hands of Indian Ministers in the Executive Council as well as in regard to subjects entrusted to the special responsibility of the Governor-General.

The Approach to Federation.

The Government of India Act, 1919, provided for the setting up of a Commission after ten years to enquire into the working of the reforms introduced by that measure. The appointment of this Statutory Commission was antedated and made in 1927. Under the chairmanship of Sir John Simon it reported in 1930 [1] in favour of self-government for the Provinces. A Round Table Conference, at which the problems of the constitutional development of India were discussed by representatives of the Imperial Government and Parliament with a large number of spokesmen on behalf of all interests in British India and with some rulers of Native States and their Ministers, met on three occasions in London during the years 1930–32. Responsibility for policy lay with the British Government and constitutional changes could only be effected by legislation, since the Act of 1919 imposed a rigid type of constitution. The Conference, however, endorsed the principle of a Federation of all India, a decision made possible after the issue of the Report of the Statutory Commission by the favourable attitude of the Native States Delegation. The British Indian communal delegates were unable to agree among themselves to any of the various proposals for sectional representation in the reconstituted Provincial Legislatures. The Prime Minister accordingly announced the Communal Award of the British Government upon which, with one modification in relation to the depressed Hindu classes, the composition of the Legislatures proposed by the Act of 1935 is based. In 1933 the British Government presented to Parliament a White Paper [2] embodying its proposals. This was referred to a Joint Select Committee of both Houses of Parliament. After taking further evidence,

[1] Vol. I., Survey; Vol. II., Recommendations, 1930, Cmd. 3568, 3569.
[2] 1933, Cmd. 4268.

including that of witnesses from India, the Committee reported in the autumn of 1934 substantially in favour of the White Paper proposals.[1] In August 1935 the Government of India Bill received the Royal Assent.

Proposed Federation.

The Act provided for a Federation of Provinces and States with a large measure of responsible government. All powers exercisable in India by any authority reverted to the King Emperor and were distributed by direct delegation to the various authorities set up by the Act. Thus the Federal Executive and each Provincial Executive would exercise independently the powers vested in them. Responsible government was for the first time to be introduced into the Central Government.[2] The Legislature would be representative of British India and the States and would consist of (1) the Council of State not subject to dissolution though one-third of its members would retire every three years, and (2) the Federal Assembly to continue for five years, unless sooner dissolved. The provisions for election to both the Council of State and Federal Assembly provided for communal and sectional representation in accordance with the Communal Award. The Governor-General in Council would normally act upon ministerial advice choosing Ministers from the Legislature, but foreign affairs, defence and European ecclesiastical affairs are reserved subjects for which the Governor-General was to be solely responsible, though he might appoint counsellors to advise him. As in the Provinces,[3] a distinction was drawn between matters on which the Governor-General might act at his discretion, *e.g.* defence, external and ecclesiastical affairs and matters on which he would receive ministerial advice but must exercise his individual judgment, *e.g.* the protection of minorities. In the event of political or economic emergency the Governor-General might act independently of his Ministers at his own discretion, *e.g.* the making of emergency ordinances and he is given full power in the event of a breakdown of the constitution. Instruments of Instruction would be issued to the Governor-General and Provincial Governors which would require the approval of the Imperial Parliament. On matters entrusted to the Governor-General's discretion or upon which he must exercise his individual judgment he must comply with the instructions of the Secretary of State for India who would of course remain responsible to the Imperial Parliament. The existing public services were specially safeguarded by the Act, and recruitment to the Indian Civil Service continues to be carried out by the Secretary of State. The Act contains no powers of constitutional amendment of any major

[1] Parliamentary Papers: Session 1933–34. H.L. 6 (I, Part I.); H.C. 5 (I, Part I.).

[2] P. 397, *ante*.

[3] P. 399, *ante*.

nature for which an Act of the Parliament of the United Kingdom would be required.

Distribution of Powers.

The Act divides in great detail the powers of the Federal and Provincial Legislatures and upon certain topics primarily provincial the Federal Legislature is given concurrent jurisdiction in the interest of securing a degree of uniformity for all India. On subjects of concurrent jurisdiction federal laws would prevail.

Accession of States to Federation.

The provisions of the Government of India Act, 1935, in regard to the Central Government, were made dependent upon accession to the Federation of a defined number (approximately half) of the States. Accession, which would be by instruments of accession which might vary from State to State, would involve the acceptance by the acceding State of federal jurisdiction in regard to a large number, but not all, of the powers allotted to the Federal Legislature.

Federal Court.

The Act provided for the establishment of a Federal Court for the interpretation of the constitution and of agreements which might be made between the Federation and its units. Power was given to the Central Legislature to extend the jurisdiction of the Federal Court. The Federal Court has been established, but its jurisdiction is at present confined to certified constitutional cases.

Developments since 1935.

The Act of 1935 came into force in regard to the Provinces in April, 1937, but it has never been operated at the centre. From 1937 to 1939 communal tension increased and there was resentment at the fact that India became at war in September, 1939, without the formal consent of the Legislatures. Congress [1] Ministries which were in power in seven Provinces resigned and by October, 1939, responsible government had come to an end in the Provinces concerned. In the remaining four Provinces responsible government continued uninterrupted. In Orissa and the North-West Frontier Province where Congress ministries had resigned in 1939, new ministries were formed in 1941 and 1943 respectively and responsible government was resumed. Opposition to the Federation had in the meantime been growing. The Moslems feared permanent Hindu domination. Congress resented the fact that representatives of the States were to be nominated, not elected. The Princes feared their position in relation to Congress and delayed negotiations for accession. In October, 1939, the Viceroy had announced that preparations for Federation were suspended. The war years marked a serious deterioration in the relations between the Government of India, Congress and the Moslem League. The Moslem League stressed its demand for Pakistan involving recognition of Moslems as a separate nation. In August, 1940, the Viceroy,

[1] The Indian National Congress formed in 1885, a predominantly Hindu political organisation.

Lord Linlithgow, appealed for co-operation in the war effort; he announced with the authority of the United Kingdom Government that the future constitution of India should (with appropriate guarantees) be framed by Indians themselves and invited representatives of all parties to join his Council in a war-time government. His proposals were rejected. The Viceroy, however, proceeded to add a number of representative Indians to his Council which was enlarged for the purpose, thus for the first time establishing a Council with a large Indian majority.

The Cripps Mission.

In March, 1942, the United Kingdom Government issued a Draft Declaration which was communicated to Indian leaders by Sir Stafford Cripps, a member of the War Cabinet, who flew to India for the purpose. The British proposals were [1] (1) that immediately upon the cessation of hostilities a constitution-making body should be set up to frame a constitution for a new Indian Union which would have the full status of a Dominion with the power to secede, if it should so choose, from the British Commonwealth; (2) that the British Government would accept and implement the constitution so framed, but that any Province or Provinces not accepting the new constitution would be entitled to frame a constitution of their own giving them the same status as the Indian Union. Indian States would similarly be free to adhere or not to the new constitution; (3) that a treaty should be negotiated between the British Government and the constitution-making body covering all matters arising out of the transfer of responsibility from British to Indian hands, particularly the protection of racial and religious minorities; (4) that, until the new constitution could be framed, the British Government must retain control of the defence of India as part of their world war effort, but the task of organising to the full the military, moral and material resources of India must be the responsibility of the Government of India in co-operation with the peoples of India.

The leaders of the parties were again invited to join the Viceroy's Government for the period of the war. Congress, however, demanded that there should be full Cabinet government with no overruling powers and negotiations broke down. It must be recognised that an acceptable constitution for India can only be framed as the result of agreement among Indians themselves, but such agreement will only be reached on the initiative of the United Kingdom Government.

Wavell Proposals.

In June, 1945, the Viceroy, Viscount Wavell, was authorised to make fresh proposals to heal the deadlock which had arisen. The British Government proposed [2] that the Executive Council should be

[1] *The Indian Problem* by R. Coupland (Oxford University Press), pp. 271–286.
[2] H. C. Deb., 5th Series, Vol. 411, cols. 1834–1837.

reconstituted so as to consist entirely of Indians with the exception of the Viceroy and Commander-in-Chief. The Viceroy, after consultation with Indian leaders, would make appointments to the Executive Council in proportions which would give a balanced representation of the main communities, including equal proportions of Moslems and Hindus. Members of the Council chosen would accept the position on the basis that they would whole-heartedly co-operate in the war against Japan. It would be assumed that co-operation at the centre would be reflected in the Provinces and so enable responsible government to be resumed in all the Provinces. External affairs, so far as British India is concerned, would be placed in the charge of an Indian member of the Council and India would be represented abroad by her own representatives. The offer of 1942 in regard to a new constitution remained unchanged and none of the new proposals would prejudice or prejudge the essential form of the future permanent constitution or constitutions for India. The new proposals, which related to British India only, failed owing to the impossibility of securing agreement on Moslem representation on the Executive Council.

CHAPTER 5.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Jurisdiction.

THE Judicial Committee of the Privy Council is one of the most important links of the Commonwealth. It acts as a supreme Court of Appeal from the courts of the Dominions, India, the Colonies, and also from the courts set up by the Crown in Protectorates and Mandated Territories.[1] It is further the final Court of Appeal from the Ecclesiastical Courts of England, from Prize Courts throughout the Empire, and from the Channel Islands and the Isle of Man. Its jurisdiction is the ancient jurisdiction of the King in Council to hear appeals from the Overseas Dependencies, which was in practice exercised by the legal members of the Council, and was made statutory in 1833 by the Judicial Committee Act of that year (amended by the Judicial Committee Act, 1844, and subsequent Acts), which set up a Judicial Committee to hear appeals either under the Act itself or under the customary jurisdiction of the Privy Council. Though not attempting to introduce the common law where other systems of law prevail, the Judicial Committee preserves the uniformity of the common law in those parts of the Empire that are ruled by common law. In addition to its appellate jurisdiction the Judicial Committee has jurisdiction conferred by statute (Judicial Committee Act, 1833, s. 4) to determine by its advice references laid before it by the Crown. The Committee has no power to place any limit as to the matters which may be so referred; they may be matters of original jurisdiction, as in the dispute between the Dominion of Canada and Newfoundland as to the Labrador territory: *In re Labrador Boundary* (1927), 43 T.L.R. 289. Apart from the general jurisdiction to hear references the Committee also hears special references under certain statutes, *e.g.* with relation to the union of ecclesiastical benefices under the Union of Benefices Measures, 1923–36.

Composition.

The Judicial Committee is composed of the Lord Chancellor, the Lord President of the Council, and former Lords President and such members of the Privy Council as hold or have held high judicial office (including the seven Lords of Appeal in Ordinary [2]); two salaried members with Indian legal experience, to whose salary British India contributes; judges or ex-judges of the Superior Courts of the Dominions (or of any Colony that may

[1] *Jerusalem and Jaffa District Governor* v. *Suleiman Murra*, [1926] A.C. 321; Chap. 2, B, *ante*.

[2] Part V., Chap. 1.

be determined by Order in Council) who are Privy Councillors;[1] and not more than two judges or ex-judges of a High Court of British India who are Privy Councillors. The King may also appoint two other Privy Councillors with no restrictions as to their qualifications. Any judge of a Superior Court of a Dominion (or of any Colony that may be determined by Order in Council) from which an appeal is being heard may be summoned to sit as an assessor, as also may such archbishops and bishops as are Privy Councillors at the hearing of an ecclesiastical cause.

Right to Appeal.

Appeals are either without the special leave of the Privy Council or with special leave. Appeals without special leave are regulated by Order in Council or local Acts. Under such Orders or Acts the right to appeal[2] is regulated according to the amount at stake in the suit, and in addition the local court may give leave to appeal in other cases. The Judicial Committee may always give special leave to appeal where any point of importance is involved, except when prevented from so doing by Imperial Act or a statute made under the authority of an Imperial Act.[3]

From the Supreme Court of Canada an appeal only lies by special leave of the Privy Council. From the High Court of Australia there is an appeal only by special leave of the Privy Council, and such leave may not be given where there are involved questions relating to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States.[4] In such cases an appeal only lies where the High Court itself gives its certificate. Appeals lie without special leave from the Supreme Courts in the Canadian Provinces and Australian States. From the Union of South Africa appeals only lie when special leave is given by the Privy Council to appeal from the Appellate Division of the Supreme Court. The Irish Free State has abolished appeals by special leave.[5]

Criminal Appeals.

Appeals are not allowed in criminal matters, unless there has been a disregard of the forms of legal process, or as the result of some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.[6] In *Knowles* v. *The King*, [1930] A.C. 366, an appeal was allowed from the decision of a judge in Ashanti, who, sitting without a jury, convicted and sentenced a man to death for murder without considering the possibility of manslaughter. In *Ras Behari Lal* v. *The King Emperor* (1933), 102 L.J. (P.C.) 104, the appeal succeeded on disclosure that a member of the

[1] The former limitation of this class of members to seven was repealed by the Administration of Justice Act, 1928, s. 13.

[2] The Judicial Committee will interpret legislation of a Dominion regulating the right to appeal. See J. & Y., p. 38.

[3] P. 407, *post*.

[4] P. 379, *ante*, text and note 1.

[5] P. 408, *post*.

[6] *In re Dillett* (1887), 12 App. Cas. 459.

jury did not understand the language in which the trial was conducted; cf. *King* v. *Thomas*, [1933] 2 K.B. 489. In *Mahlikilile Dhalamini* v. *The King*, [1942] A.C. 583, an appeal succeeded where there had been a failure to hold in public the whole of the proceedings in a murder trial.

The Future of Dominion Appeals.

There is a body of opinion in the Dominions which regards the appeal to a court sitting in the United Kingdom and composed predominantly of United Kingdom judges as a limitation upon dominion autonomy and as casting a slight upon the competency of courts of the Dominions.[1] The Imperial Conference of 1926 placed it on record that "it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected," but isolated action was deprecated. The abolition of the invalidity of legislation repugnant to Imperial Acts [2] has made it possible for all the Dominions, and possibly for the Provinces of Canada, to abolish appeals to the Judicial Committee.[3]

South Africa and Australia are given by the terms of their constitutions [4] express power to limit the right to appeal. Laws containing such limitations must be reserved for His Majesty's pleasure, but as was stated in 1929 [5] His Majesty's pleasure will be exercised in accordance with the advice of Ministers in the Dominion concerned. Under the Statute of Westminster Canada could abolish appeals to the Privy Council from the courts of the Dominion. In *Nadan* v. *The King*, [1926] A.C. 482, the Privy Council held invalid a section of a Canadian statute abolishing appeals to the Privy Council in criminal cases. A similar section was enacted in 1933 and challenged before the Privy Council in 1935.[6] It was argued that, though under section 2 of the Statute of Westminster Canada could enact legislation repugnant to the terms of the Judicial Committee Acts of 1833 and 1844, yet the power of the Crown to grant special leave to appeal to the Privy Council was an essential part of the royal prerogative which could only be restricted under the express authority of an Act of the Imperial Parliament. No such express authority had, it was argued, been conferred by the Statute of Westminster. The argument was rejected. The Privy Council took the view that the decision in *Nadan* v. *The King* had been based on two grounds: (*a*) repugnancy to the Judicial Committee Acts; (*b*) invalidity of dominion legislation having extra-territorial effect. Both these

[1] P. 380, *ante*.
[2] P. 389, *ante*.
[3] See 48 *L.Q.R.*, p. 191.
[4] Commonwealth of Australia Act, 1900, Constitution, s. 74; South Africa Act, 1909, s. 106. Reservation is retained on this point by Status of the Union Act, 1934, s. 10. See p. 386, *ante*.
[5] P. 386, *ante*.
[6] *British Coal Corporation* v. *The King*, [1935] A.C. 500.

difficulties had been removed by the Statute. By section 91 of the British North America Act, 1867, the Dominion Parliament has power to make laws for the peace, order and good government of Canada in relation to (*inter alia*) criminal law including criminal procedure. The appeal by special leave is but one element in the general system of appeals in the Dominion. What takes place outside Canada is merely ancillary to practical results which take place in Canada. The appeal is an appeal to an imperial tribunal and not to a court of the United Kingdom. By necessary intendment section 91 of the British North America Act gives to the Dominion of Canada power to prohibit in cases within its jurisdiction the appeal to the King in Council.[1]

Appeals from Eire.

Similar arguments were put forward and rejected in regard to the abolition of appeals from the Irish Free State;[2] but there were further difficulties here inasmuch as the appeal to the Privy Council had been held[3] to be ensured by the terms of article 2 of the Treaty between Great Britain and Ireland. By the terms of the treaty[4] the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown to the Dominion of Canada shall govern its relationship to the Irish Free State. It had been held[5] that this article ensured the right to petition for special leave to appeal. The treaty was given the force of law by the Irish Free State (Agreement) Act, 1922, passed by the Imperial Parliament. An Irish "House of Parliament" set up by the same Imperial Act sat as a constituent assembly to frame a constitution for the Irish Free State. The Constituent Act, passed by the "House of Parliament" with the constitution scheduled thereto, was scheduled to an Imperial Act, the Irish Free State Constitution Act, 1922. By the terms of the Constituent Act any provision of the constitution or any amendment thereof is void should it conflict with any of the provisions of the treaty. By the Constitution (Amendment No. 22) Act, 1933, of the Irish Free State it was made unlawful to petition for special leave to appeal to the Privy Council. It might have been held, as has been pointed out by Professor Keith,[6] that inasmuch as by virtue of the Statute of Westminster the Dominion of Canada now has power to abolish appeals by special leave, the

[1] It has been pointed out that this argument imputes to the British North America Act a necessary intendment that could never have been contemplated at the time of the passing of the Act. For discussion of this case, see articles cited in note 2, p. 409, *post*.

[2] *Moore* v. *Attorney-General for the Irish Free State*, [1935] A.C. 484.

[3] *Performing Right Society* v. *Bray U.D.C.*, [1930] A.C. 377.

[4] Articles of Agreement for a Treaty between Great Britain and Ireland, 1921, Art. 2.

[5] *Performing Right Society* v. *Bray U.D.C.*, *ante*.

[6] "Notes on Imperial Constitutional Law," *J.C.L.*, 3rd Series, Vol. XVII., p. 222.

Irish Free State possesses in accordance with article 2 of the treaty the same power as Canada. The Privy Council, however, went farther and held that it is now competent legally (though it may be a breach of the contractual obligations of the treaty) for the Irish Free State to pass laws which conflict with the terms of the treaty. The treaty was given the force of law by an Imperial Act. The Statute of Westminster has given to the Irish Free State power to abrogate Imperial Acts. The argument was rejected that the Constitution of the Irish Free State derived its existence from a Constituent Act passed by a Constituent Assembly which went out of existence leaving no authority capable of amending the Constituent Act. The Constitution derived its authority from an Act of the Imperial Parliament.

Appeals from Canadian Provinces.

It is still open to doubt whether the Canadian Provinces can abolish the appeal to the Privy Council in civil cases. Unlike the States of Australia the Provinces are by section 7 of the Statute given the power under section 2 to repeal Imperial Acts in so far as they form part of provincial law, and they are freed from the fetters of the Colonial Laws Validity Act, 1865. They are not, however, given power to pass laws having extra-territorial operation. In favour of the right to abolish appeal it can be argued that by section 9 of the British North America Act, 1867, the administration of justice including the constitution and maintenance of civil courts (which also comprises civil procedure) falls within the powers of the Provinces. The reasoning of the Privy Council in regarding a criminal appeal as simply one element in a Canadian proceeding might equally be used in regard to a civil appeal from a provincial court. Furthermore, though the silence of the Statute is a powerful argument to the contrary,[1] it might be urged that in accordance with the reasoning of *Croft* v. *Dunphy* [2] the Provinces may pass legislation to implement their power to control civil justice. The better opinion would, however, seem to be against the right of the Provinces to abolish the appeal. The Judicial Committee Acts of 1833 and 1844, have been described as affirming and regulating the prerogative appeal,[3] not as superseding the prerogative. *Nadan* v. *The King* has not been disapproved. Had it been intended to give to the

[1] W. P. M. Kennedy, *Essays in Constitutional Law* (Oxford University Press), p. 172, note 2.

[2] P. 387, *ante*.

[3] *British Coal Corporation* v. *The King* (*ante*). The remark in *Moore* v. *Attorney-General for the Irish Free State* (*ante*) that "the prerogative is *pro tanto* merged in the statute" would seem to refer only to the Irish treaty. Vincent C. MacDonald considers that the Judicial Committee took the view that the prerogative was merged in the statute by the enactment of the Acts of 1833 and 1844 (13 *Canadian Bar Review*, p. 628); see also Professor W. P. M. Kennedy, *ibid.*, at p. 623; Potter A. Oyler, *ibid.*, at p. 616; and W. I. Jennings in 52 *L.Q.R.*, p. 180. It is, however, submitted that this point was not decided. The Judicial Committee held, it is submitted, that, even if the prerogative was not merged in the statute, the British North America Act by necessary intendment gave power to restrict it.

Provinces power to abolish appeals, they would have been given by the Statute power to legislate with extra-territorial effect. The Dominion of Canada could abolish civil appeals from the Supreme Court, but could not abolish appeals from provincial courts. Should one Province take action, and not another, a chaotic situation would arise.[1]

Functions of Judicial Committee.

The following is a judicial pronouncement by Viscount Haldane of Cloan, delivered on the occasion of the hearing of the first appeals to the Judicial Committee from the Irish Free State. It is of great interest as illustrating the functions of the Committee when hearing appeals from both federal and unitary States:—

> We are not Ministers in any sense; we are a Committee of Privy Councillors who are acting in the capacity of judges, but the peculiarity of the situation is this: it is a long-standing constitutional anomaly that we are really a Committee of the Privy Council giving advice to His Majesty, but in a judicial spirit. We have nothing to do with policies, or party considerations; we are really judges, but in form and in name we are the Committee of the Privy Council. The Sovereign gives the judgment himself, and always acts upon the report which we make. Our report is made public before it is sent up to the Sovereign in Council. It is delivered here in a printed form. It is a report as to what is proper to be done on the principles of justice; and it is acted on by the Sovereign in full Privy Council; so that you see, in substance, what takes place is a strictly judicial proceeding.
>
> That being so, the next question is: what is the position of the Sovereign sitting in Council in giving formal effect to our advice, and what are our functions in advising him? The Judicial Committee of the Privy Council is not an English body in any exclusive sense. It is no more an English body than it is an Indian body, or a Canadian body, or a South African body, or, for the future, an Irish Free State body. There sit among our numbers Privy Councillors who may be learned judges of Canada—there was one sitting with us last week—or from India, or we may have the Chief Justice, and very often have had others, from the other Dominions, Australia and South Africa. I mention that for the purpose of bringing out the fact that the Judicial Committee of the Privy Council is not a body, strictly speaking, with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the law. He may as well sit in Dublin, or at Ottawa, or in South Africa, or in Australia, or in India, as he may sit here, and it is only for convenience, and because we have a court, and because the members of the Privy Council are conveniently here that we do sit here; but the Privy Councillors from the Dominions may be summoned to sit with us, and then we sit as an Imperial court which represents the Empire, and not any particular part of it. It is necessary to observe what effect that has upon the present situation. The Sovereign, as the Sovereign of the Empire, has retained the prerogative of justice, but by an Imperial Statute to which he assented, that was modified as regards constitutional questions in the case of Australia. That is the only case that I need refer to where there has been any modification.

[1] Kennedy, *Essays in Constitutional Law*, pp. 151 and 171.

In Ireland, under the Constitution Act, by Art. 66,[1] the prerogative is saved, and the prerogative therefore exists in Ireland, just as it does in Canada, South Africa, India, and right through the Empire, with the single exception that I have mentioned—that it is modified in the case of the Commonwealth of Australia in reference to, but only in reference to, constitutional disputes in Australia. That being so, the Sovereign retains the ancient prerogative of being the supreme tribunal of justice; I need not observe that the growth of the Empire and the growth particularly of the Dominions, has led to a very substantial restriction of the exercise of the prerogative by the Sovereign on the advice of the Judicial Committee. It is obviously proper that the Dominions should more and more dispose of their own cases, and in criminal cases it has been laid down so strictly that it is only in most exceptional cases that the Sovereign is advised to intervene. In other cases the practice which has grown up, or the unwritten usage which has grown up, is that the Judicial Committee is to look closely into the nature of the case, and, if, in their Lordships' opinion, the question is one that can best be determined on the spot, then the Sovereign is not, as a rule, advised to intervene, nor is he advised to intervene normally—I am not laying down precise rules now, but I am laying down the general principles—unless the case is one involving some great principle or is of some very wide public interest. It is also necessary to keep a certain discretion, because when you are dealing with the Dominions you find that they differ very much. For instance, in States that are not unitary States—that is to say, States within themselves—questions may arise between the Central Government and the State, which, when an appeal is admitted, give rise very readily to questions which are apparently very small, but which may involve serious considerations, and there leave to appeal is given rather freely. In Canada there are a number of cases in which leave to appeal is granted because Canada is not a unitary State, and because it is the desire of Canada itself that the Sovereign should retain the power of exercising his Prerogative; but that does not apply to internal disputes not concerned with constitutional questions, but relating to matters of fact. There the rule against giving leave to appeal from the Supreme Court of Canada is strictly observed where no great constitutional question, or question of law, emerges. In the case of South Africa, which is a unitary State, counsel will observe that the practice has become very strict. We are not at all disposed to advise the Sovereign, unless there is some exceptional question, such as the magnitude of the question of law involved, or it is a question of public interest in the Dominion to give leave to appeal. It is obvious that the Dominions may differ in a certain sense among themselves. For instance, in India leave to appeal is more freely given than elsewhere, but the genesis of that is the requirements of India, and the desire of the people of India. In South Africa, we take the general sense of that Dominion into account, and restrict the cases in which we advise His Majesty to give leave to appeal. It becomes with the Dominions more and more or less and less as they please. We go upon the principles of autonomy on the question of exercising the discretion as to granting leave to appeal. It is within the Sovereign's power, but the Sovereign, looking at the matter, exercises this discretion.—Extract from the Speech of Lord Haldane in *Hull* v. *M'Kenna and Others*, [1926] I.R. 402.

[1] Repealed in 1933.

PART XI.

CHURCH AND STATE.

Constitutional History, by F. W. Maitland (Cambridge University Press), Period V., Section J.

Halsbury, *Laws of England* (ed. Hailsham), Vol. XI. (Title, Ecclesiastical Law), Parts I., II. and III.—for reference.

A.

Religious Bodies.

Religious Freedom.

THERE are no restrictions upon freedom of worship and with but few exceptions there are to-day no disabilities attached to membership of any particular religious community. The Church of England, however, has a special status as an established church and its consequent connection with the State will require examination. Under the provisions of the Act of Settlement the Sovereign must join in communion with the Church of England, and Roman Catholics and those who marry Roman Catholics are expressly excluded from the Throne. It is probable that a Roman Catholic may not hold the office of Lord Chancellor or High Commissioner of the Church of Scotland.[1]

Effects of Recognition.

The recognition by the State of religious bodies necessarily involves relationship between these bodies and the State. The position of the Church of England as an established church is special and requires separate treatment, but all other religious bodies in England can be regarded as being upon the same footing as far as their relations with the State are concerned. The Roman Catholic Church, though an international organisation, is to the constitutional lawyer in this country a non-conformist religious body distinguished from other non-conformist bodies only because Roman Catholics remain under certain statutory disabilities. Religious bodies may hold property, in relation to which the courts administer the ordinary law of charitable trusts. The courts, too, may be required to enforce and pronounce upon the validity of the rules by which religious communities are governed. Members of a religious body may bind themselves to observe rules, and tribunals may be created to enforce such rules. Such tribunals, like other domestic tribunals, may be restrained by the courts from violating their own

[1] See speech of Viscount Simon, L.C.: *H.L. Deb.*, 5th Series, Vol. 127, col. 463.

rules or the rules of natural justice. It may be necessary for the courts to determine as a question of fact the nature of the doctrines of a religious community. Thus, in the famous case of *Free Church of Scotland* v. *Lord Overtoun*, [1904] A.C. 515, the House of Lords held that a majority of the members of a religious community might not, without committing a breach of trust disentitling them to hold the property of their community, change the doctrines on which the identity of the community was based.

Church of Scotland.

The Established Church of Scotland is a Presbyterian Church with only a limited connection with the State. Its preservation was an essential term of the Act of Union between England and Scotland. Church government in Scotland is based upon the presbytery, or assembly of ministers of a district and of representative laymen, called elders. The supreme legislative and judicial body of the Scottish Church is the General Assembly. Though presided over by the Moderator—an officer of the Church—there is present at its meetings the High Commissioner, appointed by the Crown, who takes no part in discussions, but represents the connection between Church and State.

Welsh Church.

In Ireland and Wales there are now no established churches, but the Church in Wales retains in relation to marriage laws the privileges of the Established Church in England.

B.

The Church of England.

The Establishment.

As the result of the Reformation Settlement of the sixteenth century the Church of England became a separate national church independent of the Pope. As an established church its acts and decrees are given legal sanction. The Sovereign is the Supreme Governor of the realm in all spiritual and ecclesiastical causes as well as temporal.[1] The Royal Supremacy is exercised on the advice of Ministers who are responsible to Parliament and has been subject since 1689 to parliamentary control. The Church has special privileges in relation to, *e.g.* marriage laws, the Coronation, and since 1919 legislation. Its laws are enforced by its own ecclesiastical courts. Its chief officers, the archbishops and bishops, sit in the House of Lords as spiritual peers [2] and are appointed by the Crown. The Crown sends to the Dean and Chapter a *congé d'élire* with letters missive containing the name of the person who is to be elected as bishop. This permission to elect is a form only. If the election is not made, the Crown appoints by letters patent. The law of the Church is part of the law of the land of which the

Appointment of Bishops.

Ecclesiastical Law.

[1] Act of Supremacy, 1558.

[2] Part III., Chap. 1.

civil courts take judicial notice. The ecclesiastical courts are courts in the full sense of the word. Their decrees are enforced by the State, and they are subject to the control of the ordinary courts by means of orders of certiorari and prohibition.[1] The Church may legislate for itself, but its legislation requires the consent of the State. Its forms of worship cannot be altered without the consent of Parliament.

Church Organisation. The Church of England is divided into two provinces, the province of Canterbury and the province of York. Each province is governed by an archbishop. The Archbishop of Canterbury is not only the ruler of his own diocese and province, but is also Primate of all England and the President of the Church Assembly. Each province is divided into dioceses governed by bishops. Dioceses are divided into archdeaconries, and archdeaconries into rural deaneries. A rural deanery is composed of parishes, each with its church and parish priest. Ecclesiastical parishes do not necessarily coincide with civil parishes.[2] Parishioners, *i.e.* all who reside in a parish, have, as such, rights in relation to their parish church, *e.g.* to receive the ministrations of the clergy.

Convocation. The ancient legislative assemblies of the Church are the Convocations of the two provinces of Canterbury and York. In each Convocation the bishops of the province form the Upper House, and the representatives of the clergy form the Lower House. Convocation can meet only when summoned by the Crown. Its legislation takes the form of canons, which are of no effect without the royal assent. Unless they subsequently receive the authorisation of Parliament or merely declare ancient custom, such canons bind only the clergy and laymen holding ecclesiastical office, *e.g.* churchwardens.

National Assembly of the Church of England. The difficulty of obtaining proper discussion in Parliament of proposals for legislation affecting the Church and the pressure of ordinary business upon parliamentary time led in 1919 to the passing of the Church of England Assembly (Powers) Act and the setting up of a new legislative assembly for the Church under the name of the National Assembly of the Church of England. The Assembly comprises three Houses, the House of Bishops and the House of Clergy consisting respectively of the members for the time being of the Upper and Lower Houses of the Convocations of Canterbury and York, together with the House of Laity consisting of representatives elected by a system of indirect representation, the foundation of which is the parochial church council elected by parishioners on the electoral roll of each parish at the annual parochial church meeting.[3] The Assembly may pass measures to be submitted by its

[1] Part VII., Chap. 4. [2] Part VI., Chap. 2, C.

[3] Any member of the Church of England is entitled to be placed on the electoral roll. Those elected must be communicants.

Legislative Committee to the Ecclesiastical Committee of Parliament, which consists of fifteen members of the House of Lords and fifteen members of the House of Commons, nominated at the beginning of each Parliament by the Lord Chancellor and the Speaker. The Ecclesiastical Committee reports to Parliament upon the expediency of measures submitted to it, especially with relation to the constitutional rights of His Majesty's subjects. Before reporting to Parliament the Ecclesiastical Committee submits its report to the Legislative Committee of the Church Assembly and does not present the report to Parliament, unless the Legislative Committee desires it. If the report is not presented, the measure is dropped. The report and the proposed measure are laid before both Houses of Parliament, and, upon the passing by both Houses of simple resolutions to that effect, the measure is presented for the royal assent. There is no power to amend a measure. On the receipt of such assent a measure has all the force and effect of an Act of Parliament and is published in the annual volume of the statutes. This procedure preserves the control of the State, while enabling the Church to prepare its own measures with full deliberation. The formation of the Church Assembly gave to the laity for the first time an official voice in the counsels of the Church. The National Assembly is a deliberative, and not a judicial, body, and prohibition does not lie to it from the High Court:[1] *The King* v. *The Legislative Committee of the Church Assembly, ex parte Haynes-Smith*, [1927] 1 K.B. 491. The power of Parliament to legislate for the Church in the ordinary way remains unfettered, but in practice is not, since 1921, exercised. The procedure which regulates the relationship between Parliament and the Church Assembly may form a model to be followed, should parliamentary powers ever be devolved on regional assemblies for, *e.g.* Scotland and Wales.[2]

Church and State.

Many churchmen consider that the House of Commons, comprising not only many non-churchmen, but even professed non-Christians, is not a fit body to legislate for the spiritual needs of the Church of England. The forms of worship of the Church of England, though not a result of parliamentary authorship, are sanctioned by parliamentary authorisation, and without such authorisation cannot be changed. The Prayer Book of the Church was given statutory force by the Act of Uniformity of 1558, and subsequent changes were authorised by Parliament in 1662 and again in 1872. The need of the sanction of King and Parliament for an alteration to the services of the Church is an essential part of the Royal Supremacy and the Establishment as regulated by the Elizabethan settlement. The dissatisfaction felt with the existing

[1] P. 280, *ante*.

[2] P. 40, *ante*.

position is due to the change in conditions since the sixteenth century. In Elizabethan England there was no antithesis between Church and State. Every member of the State was a member of the Church. A conflict between Church and State meant only a conflict between the laity of the Church and Clergy. " The amalgamation of Church and State had been brought about less by the Act of Supremacy than by the admission of the laity to the churchman's privileges and of the clergy to the layman's." [1] It was expected by many that the creation of the National Assembly would avert any conflict between the Church and the State; that the House of Commons would not resist the demands of a body representing the lay as well as the clerical element in the Church of England; that spiritual freedom could thus be obtained without the need of disestablishment. These expectations were not fulfilled when there was rejected in 1927, and again in 1928, a revised Prayer Book which had been carried by a large majority in both Convocations and in the National Assembly. This rejection led to a movement for the disestablishment of the Church of England. A large body in the Church insists upon the need of complete freedom to legislate upon spiritual matters, while the fear of " Romish " tendencies in a section of the Church, combined with the ancient non-conformist hostility to Church privileges, makes it unlikely that Parliament will consent to the maintenance of the privileges of the Establishment, together with the abandonment of State control.

The Law of the Church.

The law of the Church consists of (*a*) statute law, (*b*) such canons and ancient customs as were in force in England before the Reformation and have been continuously acted upon since, and are not in conflict with the laws of the land, and (*c*) post-Reformation canons which have received the royal assent. As regards statute law, from the time of Elizabeth to the creation of the National Assembly numerous statutes have regulated Church affairs, *e.g.* Acts disestablishing the Church of Ireland (1869) and the Church of England in Wales (1914), Acts founding new dioceses, authorising the creation of new parishes, establishing the Ecclesiastical Commissioners to administer church property and providing for clerical discipline. Such matters are now dealt with by Ecclesiastical Measures in the National Assembly.

The Ecclesiastical Courts.

The ecclesiastical courts constitute a graduated hierarchy, and consist of the Court of the Archdeacon, the Consistory Court of the Bishop of each diocese, and the Provincial Court of the Archbishop of each of the two provinces. The Archdeacon's Court is to-day practically obsolete, though the Archdeacon still possesses minor rights of jurisdiction. The judge of the Consistory Court is the Chancellor of the Diocese, usually a barrister, appointed by

[1] A. F. Pollard, *Political History of England*, Vol. VI. (Longmans).

the Bishop, from whom he derives his authority. In appointing the Chancellor the Bishop may reserve the right to exercise jurisdiction himself in matters where statutes do not prescribe a lay judge. Since the transfer in 1857 of the testamentary and matrimonial jurisdiction of the Ecclesiastical Courts to the Probate and Divorce Courts, the Consistory Courts deal mainly with moral offences by the clergy and applications for faculties for additions to and alterations in consecrated buildings. In exercising faculty jurisdiction the Chancellor is assisted by an advisory committee. The Clergy Discipline Act, 1892, provided for the assistance of the Chancellor by five assessors in the case of moral offences. An appeal always lies from the Consistory Court to the Provincial Court, in the province of Canterbury the Court of Arches, in the province of York the Chancery Court of York. The Dean of Arches is judge of both these courts. The authority of diocesan courts has been weakened by statutes establishing special tribunals and procedure for special classes of offences. Thus doctrinal and other offences, except those involving immorality, committed by clergy against ecclesiastical law are heard, under the provisions of the Clergy Discipline Act, 1840, not in the Consistory Court, but by Commissioners appointed by the Bishop, of whom the Chancellor may or may not be one. Offences in respect of ritual and ceremony under the Public Worship Regulations Act, 1874, are either sent direct to the Provincial Court by letters of request from the Bishop, or are heard by consent by the Bishop himself. By the Benefices (Ecclesiastical Duties) Measure, 1926, the court of appeal for the determination of cases concerning negligent or inadequate performance of ecclesiastical duties is the Archbishop of the province and a judge of the Supreme Court, appointed by the Lord Chancellor: *Huntley* v. *Bishop of Norwich*, [1931] P. 210. Appeals are brought to this court from the decisions of commissioners appointed by the Bishop. Prohibition lies to the Ecclesiastical Courts from the King's Bench Division when they act in excess of their jurisdiction or contrary to the rules of natural justice: *The King* v. *North, ex parte Oakey*, [1927] 1 K.B. 491.

Appeals to the Crown.

The Royal Supremacy involves the right of appeal to the Crown from the Provincial Courts in all cases. In 1832 the hearing of ecclesastical appeals was transferred from the Court of Delegates to the Judicial Committee of the Privy Council [1] sitting with ecclesiastical assessors. Much dissatisfaction has been expressed with the Judicial Committee as a final court of appeal for the Church, and it has been said that disobedience and disregard of the authority of the ecclesiastical courts has been due to the fact that a lay court has been the supreme tribunal for declaring the doctrines of the Church.

[1] Part X., Chap. 5.

The system entrusts the interpretation of the formularies, the exposition of the traditions, and the infliction of the spiritual censures of the Church to persons of no theological education; it grants no representation to the voice of the Church except in the utterances (which may be totally disregarded by the lay tribunal) of episcopal assessors who are alone acquainted with their purport.[1] These criticisms are considered by many to be based upon a misconception. The decision as to whether or not a given opinion is in accordance with the received doctrines of the Church involves no claim to make or unmake these doctrines. It is, however, widely felt that the supreme tribunal of the Church should have some spiritual authority, and that pronouncements as to doctrine should be made by the Church and not by a lay court. It has been suggested that in all cases in which it is necessary to determine what is the doctrine of the Church of England such question should be referred to an Assembly of the Archbishops and Bishops of both provinces.

The Clergy.

The clergy, like members of the armed forces, are subject not only to special laws, but also to the ordinary laws of the land. They have certain privileges (*e.g.* exemption from jury service and compulsory military service) and also certain disabilities. The most important civic disability is that no clergyman of the Established Church or the Church of Scotland (as no Roman Catholic priest) can be elected to the House of Commons. It has been seen that the clergy are still summoned to Parliament by the *praemunientes* clause.[2]

Property.

The Church of England is not a corporate body, and church property is the property of various corporations, sole and aggregate, which exist within the Church, *e.g.* the Dean and Chapter of a cathedral or the Rector or Vicar of a parish. There must be especially mentioned the ancient liability on all landowners to pay tithe for the benefit of the Church, mainly for the support of the parochial clergy. Tithe, originally a tenth of the fruits of the land, was commuted in 1836 for a charge upon land varying with the price of corn. The Tithe Act, 1925, stabilised tithe rent charges and provided for their payment in trust for tithe owners to Queen Anne's Bounty, a corporation set up to administer property restored to the Church in the reign of Queen Anne. By the Tithe Act, 1936, tithe rent charges were extinguished. Tithe owners received stock in lieu of tithe rent charges, and land subject to a tithe rent charge was made subject to the payment of a redemption annuity for a period of sixty years.

Ecclesiastical Commissioners.

The largest holders of Church property are the Ecclesiastical Commissioners. In the reign of William IV. there was a redistribution and fixing of the incomes of many bishops and cathedral

[1] *Report of Ecclesiastical Courts Commission*, 1883.
[2] P. 73, *ante*.

chapters. The surplus income was handed over to the Ecclesiastical Commissioners, a corporation appointed by Act of Parliament, to be administered for the general benefit of the Church. The Commissioners are the archbishops, bishops, three deans, certain Ministers of the Crown, the Lord Chief Justice, the Master of the Rolls and twelve nominated laymen. The properties of the Commission are administered by an Estates Committee consisting of two of the Commissioners and three Church Estates Commissioners of whom two are appointed by the Crown. The Second Church Estates Commissioner is usually a member of Parliament who, though not a Minister of the Crown, replies to parliamentary questions on the Commission's affairs.

Advowsons.

An advowson is the right to present a clergyman to a benefice. Advowsons are a species of property. The right to present can since 1931 only be exercised after consultation with the parochial church council. In the event of disagreement between a patron and a church council the patron may only present if he obtains the approval of the bishop of the diocese. If the bishop refuses to approve the patron's nominee, the patron may submit the bishop's decision to the archbishop of the province for review. Advowsons may be transferred, but may not be sold or transferred for valuable consideration separately from the land to which they are appendant after two vacancies have occurred subsequent to July 14, 1924.[1] Advowsons are held by laymen as well as by bishops, chapters, clerical trusts, and colleges in the older universities. Many benefices are in the patronage of the Crown, who is not bound by the provisions set out above in regard to consultation with parochial church councils.

[1] Benefices Act, 1898 (Amendment) Measure, 1923.

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APPENDIX A.

Legislative Forms.[1]

TREATY OF PEACE ACT, 1919.

Short title.

CHAPTER 33.

AN Act for carrying into effect the Treaty of Peace between His Majesty and certain other Powers. Long title.

[31*st July*, 1919] Date of Royal Assent.

WHEREAS at Versailles, on the twenty-eighth day of June, nineteen hundred and nineteen, a Treaty of Peace (including a protocol annexed thereto), a copy of which has been laid before each House of Parliament, was signed on behalf of His Majesty, and it is expedient that His Majesty should have power to do all such things as may be proper and expedient for giving effect to the said Treaty: Preamble.

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows: Enacting Clause.

1. (1) His Majesty may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to him to be necessary for carrying out the said Treaty, and for giving effect to any of the provisions of the said Treaty. Delegated Powers.

(2) Any Order in Council made under this Act may provide for the imposition, by summary process or otherwise, of penalties in respect of breaches of the provisions thereof, and shall be laid before Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act, but may be varied or revoked by a subsequent Order in Council and shall not be deemed to be a statutory rule within the meaning of section one of the Rules Publication Act, 1893:

Provided that, if an address is presented to His Majesty by either House of Parliament within the next twenty-one days on which that House has sat after any Order in Council made under this Act has been laid before it praying that the Order or any part thereof may be annulled, His Majesty in Council may annul the Order or such part thereof, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder. Method of Parliamentary Control of Delegated Power.

(3) Any expenses incurred in carrying out the said Treaty shall be defrayed out of moneys provided by Parliament.

2. This Act may be cited as the Treaty of Peace Act, 1919. Citation.

[1] Excluding Orders in Council and Departmental Regulations.

ENACTING CLAUSE (SUPPLY BILL).

MOST GRACIOUS SOVEREIGN,

We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom in Parliament assembled, towards raising the necessary supplies to defray Your Majesty's public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto Your Majesty the several duties hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted, and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

VOTE FOR SUPPLY SERVICES.

APPROPRIATION ACT, 1930.

Schedule (B), Part 9.

Civil—Class II.

Schedule of sums granted and of the sums which may be applied as appropriations in aid in addition thereto, to defray the charges of the several Civil Services herein particularly mentioned, which will come in course of payment during the year ending on the 31st day of March, 1931, viz.:

	Sums not Exceeding	
	Supply Grants.	Appropriation in Aid.
No.	£	£
1. For the salaries and expenses of the department of His Majesty's Secretary of State for Foreign Affairs	195,930	117,090
2. For the expenses in connection with His Majesty's embassies, missions, and consular establishments abroad, and other expenditure chargeable to the Consular Vote, relief of refugees from the Near East, certain special grants, including a grant in aid, sundry services arising out of the war and a loan to the European Commission of the Danube	1,076,679	504,307
3. For a contribution towards the expenses of the League of Nations and for other expenses in connection therewith, including British Representation before the Permanent Court of International Justice.	92,000	—
4. For the salaries and expenses of the department of His Majesty's Secretary of State for Dominion Affairs (including a supplementary sum of £7,450)	65,610	43,511

	Sums not Exceeding	
	Supply Grants.	Appropriation in Aid.
No.	£	£
5. For sundry Dominion services, including certain grants in aid and for expenditure in connection with ex-service men in the Irish Free State and for a grant in aid to the Irish Free State in respect of compensation to transferred officers . .	81,309	42,817
6. For a grant in aid of the Empire Marketing Fund (including a supplementary sum of £62,500) .	612,500	—
7. For the expenses connected with Oversea settlement, and expenses arising out of the Empire Settlement Act, 1922	833,250	72,500
8. For the salaries and expenses of the department of His Majesty's Secretary of State for the Colonies (including a supplementary sum of £4,000) .	151,306	4,783
9. For sundry Colonial and Middle Eastern services under His Majesty's Secretary of State for the Colonies (including certain non-effective services and grants in aid)	1,218,565	48,100
10. For a grant in aid of the Colonial Development Fund and for grants towards interest on certain Overseas Loans	812,200	—
11. For a contribution towards the cost of the department of His Majesty's Secretary of State for India in Council, including a grant in aid (including a supplementary sum of £35,000) . . .	207,500	—
12. For certain salaries and expenses of the Imperial War Graves Commission, including purchase of land in the United Kingdom, and a grant in aid of the Imperial War Graves Commission Fund, formed under Royal Charter, 21st May, 1917, and a contribution towards an endowment fund .	652,295	—
Total, Civil, Class II. . . £	5,999,144	833,108

TITLE OF MEASURE OF NATIONAL ASSEMBLY.

MEASURES (20 GEO. 5)—No. 1.

A Measure passed by the National Assembly of the Church of England. To consolidate and amend the Law relating to the sale, purchase and improvement of Parsonage Houses.

[20*th March*, 1930]

TITLE OF PROVISIONAL ORDER CONFIRMATION ACT.

25 and 26 GEO. 5. P. XLV.

An Act to confirm a Provisional Order of the Minister of Transport under the Portsmouth Corporation Act, 1930, relating to Portsmouth Corporation Trolley Vehicles.

APPENDIX B.

Note on Documents issued by the Crown.[1]

SOME appreciation of the wide activities of government may best be gathered from a consideration of documents issued by the Crown and Ministers. These fall into two main classes: (1) documents executed by, or in the name of the King, many of which bear His Majesty's signature, and (2) Departmental Orders. The latter category is so vast that, beyond a reproduction in Appendix C of some specimen orders, no attempt can be made to enumerate the documents which issue from the departments in the course of their administrative activities. Some figures of Statutory Rules and Orders published in recent years, which include the more important documents of this class, have been given elsewhere.[2]

Royal (as opposed to departmental) documents fall under three heads:

(1) Orders in Council.

(2) Warrants, Commissions and Orders under the Sign Manual.

(3) Proclamations, Writs, Letters Patent, Charters, Grants and other documents under the Great Seal.

Orders in Council.

(1) By means of Orders made by the King, by and with the advice of his Privy Council, are exercised the prerogative and statutory powers of the Crown. As an example of a prerogative Order in Council may be cited colonial legislation, such as the Nigeria (Legislative Council) Order, 1928, reconstituting the Legislative Council of the Colony, or the Order in Council commanding the issue of writs for the calling of a new Parliament, which accompanies the Proclamation dissolving Parliament. The statutory powers of the Crown are normally exercised by Order in Council, if they are conferred upon the Crown, as under the Foreign Jurisdiction Act, 1890, and not upon a specified Minister or department, as such. The results attendant on appeals to the Judicial Committee are promulgated in this manner, the King in Council making an Order on the advice tendered by the Committee. While legal responsibility for Orders in Council rests upon the members of the Privy Council in attendance at the meeting (usually not more than four or five), other than the Sovereign, if he be present, political responsibility rests with the Minister, in whose department the draft Order is framed.

Warrants, Commissions and Orders under the Sign Manual.

(2) Documents under the Sign Manual relate both to prerogative and statutory powers. They are used to authorise administrative acts and to make appointments to office or to commissioned ranks in the Forces. Instructions to Colonial Governors, as well as their Commissions of Appointment, are examples of documents so executed. The term, Sign Manual, is applied to the execution by signature of instruments which

[1] Halsbury, *Laws of England* (ed. Hailsham), Vol. VI., pp. 593 ff., should be consulted on this subject. See also Anson, *Law and Custom of the Constitution*, 4th ed., Vol. 2, Part I., pp. 62–72.

[2] P. 290, *ante*; Sir Cecil Carr, *Ban Delegated Legislation* (Cambridge University Press), should be consulted.

require the King's own hand. Either the Seal of the Secretary of State concerned or the counter-signature of such Secretary or other responsible Minister is required.

The Great Seal.

(3) The Great Seal is employed for the issue of writs for parliamentary elections and to summon peers to sit in Parliament, for treaties and for all public instruments and orders of State which relate to the whole Kingdom. It is brought into use by a Warrant under the Sign Manual, signed by the King's own hand and counter-signed either by the Lord Chancellor, a Secretary of State, or two Lords Commissioners of the Treasury, but in some cases it may be employed by order of the Lord Chancellor without previous authorisation by Sign Manual Warrant: Great Seal Act, 1884. Proclamations may only be issued by authority of the Crown under the Great Seal; no private person may issue a proclamation. Proclamations are valid in law on publication in the *London Gazette*; they receive judicial notice and are of the same validity as Acts of Parliament, though their lawful use is restricted to prerogative acts and calling attention to provisions of existing law: *Case of Proclamations* (1611).

Letters Patent are used (*inter alia*) to constitute an office, to confer a title, to appoint a Royal Commission enquiring into an important problem of the day and to provide for the government of a colony. They must be distinguished from a Patent conferred by statutory authority under the seal of the Patent Office, granting a monopoly of making, using and selling an article of manufacture new within the realm to the first and true inventor, a purely departmental matter under the Board of Trade.

Grants and Charters confer franchises, create corporations and grant prerogative privileges, many of which are now regulated by statute.

Appointments to Office.

The following are a few examples of the various ways in which appointments to office are effected:

Office.	*Mode of Appointment.*
Most appointments to office as Ministers of Cabinet Rank.	Delivery of Seals of Office.
Governor-General of India.	Warrant under Sign Manual.
Colonial Governor.	Commission under Sign Manual and Signet.
Lord President of the Council.	Declaration by the Sovereign.
Army Officer.	Commission from the Sovereign.
Naval Officer.	Commission from Lords Commissioners of the Admiralty.
Civil Service Commissioners.	Order in Council.

APPENDIX C.

Forms of Prerogative and Statutory Orders and Regulations.

THE object of this Appendix is to present the reader with specimens of some of the executive documents to which reference has been made from time to time. Both documents issued in the name of the King and specimens of departmental rules and orders, which are a leading feature of present-day administration, are included. The authors desire to acknowledge the assistance of the Departments of State in facilitating the reproduction of certain documents and the courtesy of the Comptroller of H.M. Stationery Office in allowing the reproduction in an unofficial work of documents, the copyright of which is vested in the Crown. For the accuracy of reproduction the authors alone are responsible. The Letters Patent, the Instructions and the Commission appointing the Governor of the Colony of Fiji are reproduced as affording an excellent example of the enactment in precise terms of a constitution reflecting in many ways the rules of English constitutional law.

Royal Proclamation.

BY THE KING.

A PROCLAMATION.

For Dissolving the Present Parliament, and Declaring the Calling of another.

GEORGE R.I.

WHEREAS We have thought fit, by and with the advice of Our Privy Council, to dissolve this present Parliament which stands prorogued to Friday, the Twenty-fourth day of May instant; We do, for that End, publish this Our Royal Proclamation, and do hereby dissolve the said Parliament accordingly: And the Lords Spiritual and Temporal, and the Knights, Citizens, and Burgesses, and the Commissioners for Shires and Burghs, of the House of Commons, are discharged from their Meeting and Attendance on the said Friday, the Twenty-fourth day of May instant: And We being desirous and resolved, as soon as may be, to meet Our People, and to have their Advice in Parliament, do hereby make known to all Our loving Subjects Our Royal Will and Pleasure to call a new Parliament: And do hereby further declare, that, by and with the advice of Our Privy Council, We have given Order that Our Chancellor of Great Britain and Our Governor of Northern Ireland do respectively, upon Notice thereof, forthwith issue out Writs, in due Form and according to Law, for calling a new Parliament: And We do hereby also, by this Our Royal Proclamation under Our Great Seal of Our Realm, require Writs forthwith to be issued accordingly by Our said Chancellor and Governor respectively, for causing the Lords Spiritual and Temporal and Commons who are to serve in the said Parliament to be duly returned to, and give their

Attendance in, Our said Parliament on Tuesday, the Twenty-fifth day of June next, which Writs are to be returnable in due course of Law.

Given at Our Court of Saint James, this Tenth day of May, in the year of Our Lord One thousand nine hundred and Twenty-nine, and in the Twentieth year of Our Reign.

GOD SAVE THE KING.

A Proclamation followed commanding all the peers of Scotland to meet at the Palace of Holyroodhouse, Edinburgh, at noon on Friday, May 31, to choose the 16 peers to sit and vote in the House of Lords in the next Parliament.

Orders in Council were also gazetted as follows:

The Lord High Chancellor of Great Britain and the Governor of Northern Ireland were ordered forthwith to cause writs to be issued for the calling of a new Parliament, to meet on Tuesday, June 25.

The Convocations of Canterbury and York were forthwith dissolved, and the Lord Chancellor was to cause writs to be issued for electing new members of the Convocations. The writs were to be returnable on Wednesday, July 10.

KENYA.

Orders in Council. (1) Prerogative Legislation.[1]

THE KENYA (ANNEXATION) ORDER IN COUNCIL, 1920.

1920, No. 2342.

At the Court at Buckingham Palace, the 11th day of June, 1920.

PRESENT,

The King's Most Excellent Majesty in Council.

WHEREAS the territories in East Africa situate within the limits of this Order and forming part of the Protectorate known as the East Africa Protectorate, are under the Protection of His Majesty the King:

And whereas British subjects have settled in large numbers in the said territories, and it is expedient, with a view to the further development and more convenient administration of the said territories, that they should be annexed to and should henceforth form part of His Majesty's Dominions:

Now, therefore, His Majesty is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

I. This Order may be cited as the Kenya (Annexation) Order in Council, 1920.

II. Until further provision shall be made in respect thereof, the limits of this Order are the territories comprised in the East Africa Protectorate as specified in the East Africa Order in Council, 1902 (*a*), save and excepting only such territories therein included as form part of the Dominions of His Highness the Sultan of Zanzibar.

[1] The form of an Order in Council made under statutory powers is similar.

III. From and after the coming into operation of this Order the said territories shall be annexed to and form part of His Majesty's Dominions and shall be known as the Colony of Kenya, hereinafter called the Colony.

IV. Nothing in this Order shall affect the validity of any Commission or Instructions issued by His Majesty under the Royal Sign Manual and Signet to the Governor and Commander-in-Chief of the territories now included within the limits of this Order, or of any Order in Council affecting the said territories, or of any Ordinance, Proclamation or Regulations passed or issued under any such Instructions or Order, or of any act or thing done under such Instructions, Order, Ordinance, Proclamation or Regulations, save in so far as any provision of any such Order in Council, Ordinance, Proclamation or Regulations may be repugnant to the provisions of any Act of Parliament which may, by reason of the annexation hereby declared, become extended to the Colony, or to any Order or regulation made under the authority of any such Act, or having in the Colony the force and effect of any such Act.

V. This Order shall be published in the Official Gazette of the East Africa Protectorate, and shall thereupon commence and come into operation, and the Governor shall give directions for the publication of this Order at such places and in such manner, and for such time or times, as he thinks proper for giving publicity thereto within the Colony.

VI. His Majesty may from time to time revoke, alter, add to, or amend this Order.

And the Right Honourable Viscount Milner, G.C.B., G.C.M.G., one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

ALMERIC FITZROY.

L.S.

JUDICIAL ORDER IN COUNCIL.

Orders in Council. (2) Order on Report of Judicial Committee of Privy Council.

At the Court at Buckingham Palace, the 26th day of June, 1930.

PRESENT,

The King's Most Excellent Majesty.

Lord President. Lord Colebrooke.
Lord Passfield. Lord Blanesburgh.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 23rd day of June, 1930, in the words following, viz.:

WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the Supreme Court of Canada between the Trustees of St. Luke's Presbyterian Congregation of Saltsprings a body Corporate Alex. C. Macdonald William Fraser William H. Mackay D. Hedley Ross Munro Gunn Robert A. Robertson George Gray Roderick Mackay and John R. Young Appellants and Alexander Cameron Gordon Proudfoot C. A. Maxwell K. A. Murray John Bishop W. C. Proudfoot Robert Johnston John McN. Campbell

and Alexander Halliday Respondents (Privy Council Appeal No. 98 of 1929) and likewise a humble Petition of the Appellants setting forth that on the 1st September 1925 the Respondents brought an Action in the Supreme Court of Nova Scotia alleging that in accordance with the United Church of Canada Act (Statutes of Canada 14-15 Geo. 5, c. 100) the St. Luke's Presbyterian Congregation of Saltsprings at a meeting regularly called and held decided by a majority of votes not to enter the Union of Churches provided for by the Act; that under the Act and the Nova Scotia Act c. 122 of the Acts of 1924 the congregation became and was a non-concurring congregation and that an alleged subsequent meeting of the congregation held on or about the 27th July 1925 and all proceedings thereat were null and void and of no effect and the Respondents claimed declarations injunctions and other relief: that on the 2nd February 1926 the Supreme Court delivered judgment dismissing the Respondents' Action: that the Respondents having appealed to the Supreme Court of Nova Scotia *in banco* the Court by a majority (Mellish J. dissenting) on the 9th April 1927 delivered judgment allowing the Appeal: that the Appellants having appealed and the Respondents having cross-appealed to the Supreme Court of Canada the Court on the 5th February 1929 delivered Judgment by a majority (Duff J. dissenting) varying the Judgment of the Supreme Court of Nova Scotia *in banco* by striking out the fourth paragraph thereof containing the declaration that the congregation might still enter into the Union and suspending the enforcement of the Judgment and subject to such variation affirming the Judgment: that by Your Majesty's Order in Council dated the 15th August 1929 the Appellants were granted special leave to appeal upon depositing in the Registry of the Privy Council the sum of £400 as security for costs which condition has since been complied with; And humbly praying Your Majesty in Council to take their Appeal into consideration and that the Judgment of the Supreme Court of Canada dated the 5th February 1929 may be reversed altered or varied or for further or other relief:

THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and having heard Counsel on behalf of the parties on both sides Their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that the Judgment of the Supreme Court of Nova Scotia *in banco* dated the 9th day of April 1927 as varied by the Judgment of the Supreme Court of Canada dated the 5th day of February 1929 ought to be further varied by deleting from the second paragraph thereof subparagraph "(2) that the Reverend Robert Johnston was at all material times and is Moderator *pro tempore* or *interim* Moderator of the said congregation" and also by deleting from the third paragraph thereof the following words with which that paragraph concludes: "and from interfering with the exercise by the Plaintiff Robert Johnston of the rights powers and privileges of the office of Moderator *pro tempore* or *interim* Moderator of the said congregation"; (2) that in all other respects this Appeal ought to be dismissed and the Judgment of the Supreme Court of Canada dated the 5th day of February 1929 affirmed; and (3) that there ought to be paid by the Appellants to the Respondents their costs of this

Appeal incurred in the Supreme Court of Canada and that out of the said sum of £400 so deposited as aforesaid the Registrar of the Privy Council ought to be directed to pay out to the Solicitors for the Respondents in England the sum of £361 12s. 10d. (being the amount of the Respondents' taxed costs of this Appeal incurred in England) and to repay to the Solicitors for the Appellants in England the sum of £38 7s. 2d. (being the balance of the said sum of £400 after payment thereout of the said taxed costs of the Respondents).

His Majesty having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer Administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. Hankey.

STATUTORY RULES AND ORDERS, 1942, No. 2072.

EMERGENCY POWERS (DEFENCE).

Location of Industry (Restriction).

The Location of Industry (Restriction) Order, 1942, dated October 6, 1942, made by the Board of Trade under Regulation 55A of the Defence (General) Regulations, 1939.

(1) Order made under a Defence (statutory) Regulation.

The Board of Trade in pursuance of the powers conferred upon them by Regulation 55A of the Defence (General) Regulations, 1939, hereby order as follows:—

1. No person shall, except under the authority of a licence granted by the Board of Trade and in accordance with conditions attached thereto, carry on at any premises situated in Great Britain:

(*a*) (being premises which on the 26th July, 1941, had been, or were being used, otherwise than as a factory or a warehouse), any trade or business which would cause those premises to be either a factory or a warehouse; or

(*b*) (being premises which on the 26th July, 1941, had been, or were being, used as a factory or warehouse) any trade or business which was not being carried on to a substantial extent by that person at those premises on that date.

2. This Order shall not apply to a local authority.

3. For the purposes of this Order:—

(*a*) the expression "factory" has the meaning assigned in Section 151 of the Factories Act, 1937 (a).

(*b*) the expression "local authority" has the meaning assigned in Regulation 100 of the Defence (General) Regulations, 1939.

(*c*) the expression "warehouse" means any premises used for the purposes of storing articles of any description, not being vehicles

(a) 1 Edw. 8 & 1 Geo. 6, c. 67.

(other than motor vehicles or pedal cycles, carrier cycles and tricycles) or vessels.

4.—(1) The Location of Industry (Restriction) Order, 1941 (b), is hereby revoked.

(2) Any licence granted by the Board of Trade under the Order hereby revoked which was in force immediately before the coming into operation of this Order shall continue in force, and shall have effect as if it had been issued hereunder.

(3) Nothing in this Order shall prohibit any person from continuing to carry on any trade or business which he could lawfully have continued to carry on if the Order hereby revoked had remained in force.

5. This Order may be cited as the Location of Industry (Restriction) Order, 1942, and shall come into operation on the 12th day of October, 1942.

Dated this sixth day of October, 1942.

R. J. W. STACY,
An Assistant Secretary
of the Board of Trade.

(b) S.R. & O. 1941 (No. 1100) II, p. 1370.

EXPLANATORY NOTE.[1]

By this Order, the obligation to obtain a licence from the Regional Offices of the Control of Factory and Storage Premises before changing the use to which a factory or warehouse of 3,000 square feet or over is put, or using any premises of that size for production or storage purposes, is now extended to premises below 3,000 square feet.

This Order replaces the earlier Order, but existing licences are not affected, nor does the Order impose any obligation to apply for a licence in order to continue to carry on business in premises which were exempt under the earlier Order.

The General Storage Licence issued under the earlier Order remains in force. This General Licence permits goods to be stored temporarily for 28 days without a licence.

ORDER FOR DEMOLITION OF A HOUSE.

(2) Demolition Order, Form of, under Housing Act, 1936, s. 11. Scheduled to Housing Act (Form of Orders and Notices) Regulations, 1937.

Whereas the [Council of] (hereinafter referred to as "the Council") are satisfied that the house which is occupied, or of a type suitable for occupation, by persons of the working classes, is unfit for human habitation, and is not capable at a reasonable expense of being rendered so fit;

and Whereas in accordance with the requirements of section 11 of the Housing Act, 1936, notices of the time and place fixed for the consideration of the condition of the above-mentioned house and any offer with respect to the carrying out of works or the future user of the house have been duly

[1] Explanatory notes are only issued with subordinate legislation made under the Emergency Powers (Defence) Acts, 1939–40.

served upon all persons upon whom such notices are required to be served;
and Whereas the Council after such consideration have not accepted an undertaking from an owner or mortgagee with respect to the carrying out of such works or the future user of the house:

Now Therefore the Council in pursuance of sub-section (4) of section 11 of the Housing Act, 1936, hereby order as follows:—

(1) that the said house be vacated within days from the date on which this Order becomes operative;
(2) the said dwelling-house be demolished within six weeks after the expiration of the last-mentioned period, or if the house is not vacated before the expiration of that period, within six weeks after the date on which it is vacated.

Dated this day of 19 .
(To be sealed with the Common Seal of the Local Authority and signed by their clerk.)

NOTE.

Any person aggrieved by a demolition order.....may within 21 days after the date of the service of the Order appeal to the County Court ..... No proceedings may be taken by the local authority to enforce any order against which an appeal is brought, before the appeal has been finally determined.....

PATENT FOR CREATION OF A PEER.

Letters Patent. Form for creation of Baron.

GEORGE THE FIFTH by the Grace of God of Great Britain Ireland and the British Dominions beyond the Seas King Defender of the Faith To all Lords Spiritual and Temporal and all other Our Subjects whatsoever to whom these Presents shall come Greeting Know Ye that We of Our especial grace certain knowledge and mere motion do by these Presents advance create and prefer Our to the state degree style dignity title and honour of Baron of in Our County of And for Us Our heirs and successors do appoint give and grant unto him the said name state degree style dignity title and honour of Baron to have and to hold unto him and the heirs male of his body lawfully begotten and to be begotten Willing and by these Presents granting for Us Our heirs and successors that he and his heirs male aforesaid and every of them successively may have hold and possess a seat place and voice in the Parliaments and Public Assemblies and Councils of Us Our heirs and successors within Our United Kingdom amongst other Barons And also that he and his heirs male aforesaid successively may enjoy and use all the rights privileges pre-eminences immunities and advantages to the degree of a Baron duly and of right belonging which other Barons of Our United Kingdom have heretofore used and enjoyed or as they do at present use and enjoy.

In Witness, &c.

APPOINTMENT OF AMBASSADOR.

(L.S.) GEORGE R.I.

GEORGE, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India, etc., etc.. etc.

To All and Singular to whom these Presents shall come, Greeting !

Whereas it appears to Us expedient to nominate some Person of approved Wisdom, Loyalty, Diligence, and Circumspection to represent Us in the character of Our Ambassador Extraordinary and Plenipotentiary to

Now Know Ye that We, reposing especial trust and confidence in the discretion and faithfulness of Our (Right) Trusty and Well-beloved (Counsellor) (Sir).....have nominated, constituted and appointed, as We do by these Presents nominate, constitute and appoint him the said

to be Our Ambassador Extraordinary and Plenipotentiary to

as aforesaid. Giving and Granting to him in that character

all Power and Authority to do and perform all proper acts, matters and things which may be desirable or necessary for the promotion of relations of friendship, good understanding and harmonious intercourse between Our Realm and

and for the protection and furtherance of the interests confided to his care ; by the diligent and discreet accomplishment of which acts, matters and things aforementioned he shall gain Our approval and show himself worthy of Our high confidence.

And We therefore request all those whom it may concern to receive and acknowledge Our said

as such Ambassador Extraordinary and Plenipotentiary as aforesaid and freely to communicate with him upon all matters which may appertain to the objects of the high Mission whereto he is hereby appointed.

Given at Our Court of Saint James, the day of in the year of Our Lord One Thousand Nine Hundred and Thirty , and in the Year of Our Reign.

By His Majesty's Command.

(Countersigned by One of His Majesty's Principal Secretaries of State.)

FREE PARDON.

GEORGE THE FIFTH, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith. To all to whom these Presents shall come, Greeting !

WHEREAS A.B. was convicted of and was thereupon sentenced to

NOW KNOW YE that We in consideration of some circumstances humbly represented to Us are graciously pleased to extend Our Grace and Mercy to the said A.B. and to grant him Our Free Pardon in respect of the said conviction, thereby pardoning, remitting and releasing unto him all pains penalties and punishments whatsoever that from the said conviction may ensue ; and We do hereby command all Judges, Justices and others whom it may concern that they take due notice hereof ; and We do require and direct our Prison Commissioners and the Governor of any Prison in which the said A.B. may be detained in respect of the said conviction to cause him to be forthwith discharged therefrom ;

And for so doing this shall be a sufficient Warrant.

Given at Our Court at St. James's the day of 19 in the year of Our reign.

By His Majesty's Command.

(Countersigned by One of His Majesty's Principal Secretaries of State.)

DOCUMENTS PROVIDING FOR GOVERNMENT OF A COLONY WITH A PARTLY ELECTED LEGISLATURE.

LETTERS PATENT passed under the Great Seal of the United Kingdom, constituting the Office of Governor and Commander-in-Chief of the Colony of Fiji, and providing for the Government thereof.

Letters Patent, dated 9th February, 1929.

George the Fifth by the Grace of God of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To all to whom these Presents shall come, Greeting !

Recites Letters Patent, 31st January, 1914.

WHEREAS by certain Letters Patent passed under the Great Seal of the United Kingdom, bearing date at Westminster the Thirty-first day of January 1914, provision was made for the administration of the government of Our Colony of Fiji:

Recites Letters Patent of 20th July, 1916.

And whereas by certain further Letters Patent, bearing date the Twentieth day of July 1916, the aforesaid Letters Patent of the Thirty first day of January 1914 have been amended:

And whereas We are minded to make fresh provision for the administration of the government of Our Colony of Fiji:

Now know ye that We do by these Presents revoke the above recited Letters Patent of the Thirty-first day of January 1914, and the Twentieth day of July 1916, but without prejudice to anything lawfully done thereunder, and We do by these Our Letters Patent declare Our Will and Pleasure as follows:— Revokes Letters Patent of 31st January, 1914, and 20th July, 1916.

1. There shall be a Governor and Commander-in-Chief (hereinafter called the Governor) in and over Our Colony of Fiji (hereinafter called the Colony), and appointments to the said Office shall be made by Commission under the Royal Sign Manual and Signet. Office of Governor constituted.

2. The Governor shall do and execute, in due manner, all things that belong to his said office, according to the several powers and authorities granted or appointed him by virtue of these Our Letters Patent and of such Commission as may be issued to him under the Royal Sign Manual and Signet, and to such other powers and authorities, being still in force, as may have been heretofore given to any of his predecessors in his said office, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through a Secretary of State, and according to such Laws as are now or shall hereafter be in force in the Colony. Governor's powers and authorities.

3. Every person appointed to fill the office of Governor shall with all due solemnity, before entering on any of the duties of his office, cause the Commission appointing him to be Governor to be read and published at the seat of Government, in the presence of the Chief Justice of the Colony, and of such Members of the Executive Council thereof as can conveniently attend, which being done, he shall then and there take before them the Oath of Allegiance, in the form provided by an Act passed in the Session holden in the Thirty-first and Thirty-second years of the Reign of Her Majesty Queen Victoria, intituled an Act to amend the Law relating to Promissory Oaths; and likewise the usual Oath for the due execution of the office of Governor and for the due and impartial administration of justice; which Oaths the said Chief Justice, or, if he be unavoidably absent, the senior Member of the Executive Council then present, is hereby required to administer. Publication of Governor's Commission. Oaths to be taken by Governor. Imperial Act, 31 & 32 Vict. c. 72.

4. The Governor shall keep and use the Public Seal of the Colony for sealing all things whatsoever that shall pass the said Public Seal. Public Seal.

5. For the purpose of advising the Governor, there shall be an Executive Council for the Colony, and the said Council shall consist of such persons and shall be constituted in such manner as may be directed by any Instructions which may from time to time be addressed to the Governor under the Royal Sign Manual and Signet, or through a Secretary of State, and all such persons shall hold their places in the said Council at Our pleasure. Executive Council.

6. On and after a date to be fixed by the Governor by Proclamation the Legislative Council constituted in accordance with the above recited Letters Patent of the Thirty-first day of January 1914, and the Twentieth day of July 1916, shall cease to exist, and in place thereof there shall be in and for the Colony a Legislative Council constituted as hereinafter provided. Legislative Council.

Until the date to be fixed by the Governor as aforesaid but no longer, the constitution, appointment and powers of the Legislative Council

constituted in accordance with the said Letters Patent of the Thirty-first day of January 1914, and the Twentieth day of July 1916, shall continue in force notwithstanding the revocation of the said Letters Patent under the provisions of these Our Letters Patent.

Composition of Legislative Council.

7. The Legislative Council shall consist of the Governor as President, not more than thirteen Nominated Members, six European Elected Members, three Native Members, and three Indian Elected Members.

Nominated Members. Qualifications.

8. The Nominated Members of the Legislative Council shall be such persons holding public office in the Colony as the Governor may from time to time by instrument under the Public Seal of the Colony appoint, subject to Our disallowance or confirmation through a Secretary of State.

Vacation of Seats.

The Nominated Members of the Council shall hold their places therein during Our Pleasure, and shall in any case vacate their seats at the next dissolution of the Council after their appointment. If any Nominated Member cease to hold public office in the Colony, his seat upon the Council shall thereupon become vacant.

Appointments of Nominated Members to be immediately reported.

The Governor shall without delay report to Us for Our confirmation or disallowance, to be signified through a Secretary of State, every appointment of any person as a Nominated Member of the Council.

9. The European Elected Members of the Council shall be elected as follows:—

(1) Two Members by persons duly qualified as European electors as hereinafter provided. (Here follow electoral areas.)

. . . . . .

Native Members.

10. The Native Members shall be appointed as follows:—

(1) The Great Council of Native Chiefs in the Colony shall at the Meeting held by the said Great Council next following a dissolution of the Legislative Council, or when required so to do, submit to the Governor the names of not less than four, nor more than six persons, being aboriginal natives of the Colony, who are able to speak and understand the English language, and from the persons submitted the Governor shall select three persons who shall upon such selection be and become Members of the Legislative Council.

. . . . . .

Election of Indian Elected Members. Indian Electoral Divisions.

11. The Indian Elected Members shall be elected by persons duly qualified as Indian electors as hereinafter provided.

12. For the purpose of the election of Indian Elected Members the Colony shall be divided into the following three Electoral Divisions:—

. . . . . .

Oath to be taken by Members of Council.

14. No Member of the Council shall sit or vote therein until he shall have taken and subscribed the following oath before the Governor, or some person authorised by the Governor to administer such oath:—

"I, A.B., do swear that I will be faithful and bear true allegiance "to His Majesty King George, his heirs and successors, according "to law.

"So help me God."

Provided that every person authorised by law to make an affirmation instead of taking the oath may make such affirmation instead of taking the said oath.

. . . . . .

Suspension of Nominated Members.

16. The Governor may by an instrument under the Public Seal of the Colony suspend any Nominated Member of the Legislative Council from the exercise of his functions as a Member of the Council. Every such suspension shall be forthwith reported by the Governor to a Secretary of State, and shall remain in force unless and until it shall be either removed by the Governor by an instrument under the said Seal, or disallowed by Us through a Secretary of State.

Qualifications of European Elected Members.

17. No person shall be qualified to be elected as a European Elected Member of the Council, or, having been so elected, to sit or vote in the Council unless he—

(1) Is qualified to be registered as a European elector; and
(2) Has been continuously resident for two years in the Colony; and either
(3) (Here follow alternative property qualifications.)

. . . . . .

Qualifications of Indian Elected Members.

18. No person shall be qualified to be elected as an Indian Elected Member of the Council, or having been so elected, to sit or vote in the Council unless he—

(1) Is qualified to be registered as an Indian Elector; and
(2) Has been continuously resident for two years in the Colony; and
(3) Is able to speak and understand the English language to the satisfaction of the Registration Officer subject to an appeal from the decision of the Registration Officer to the Supreme Court; and either
(4) (Property qualifications.)

. . . . . .

Disqualification of Elected Members.

19. No person shall be capable of being elected a Member of the Council, or, having been elected, shall sit or vote in the Council, who—

(1) Has been sentenced by any competent British Court, whether of the Colony or not, for any crime punishable by death, hard labour for any period, or imprisonment for a period exceeding one year, and has not received a free pardon from Us for the crime for which he has been sentenced; or
(2) Is an undischarged bankrupt, whether he has been declared a bankrupt by a Court in the Colony or by any other British Court; or
(3) Has within five years before the election received charitable relief in the Colony from any public source; or
(4) Is of unsound mind; or
(5) Is in receipt of salary payable out of the public revenue of the Colony.

Deposit by Candidate.

20. (1) Every candidate nominated at any election of a Member of the Council, or some one on his behalf, shall, as soon as his nomination has been accepted by the returning officer or registration officer, or within forty-eight hours thereafter, deposit, or cause to be deposited, with the returning officer or registration officer the sum of twenty-five pounds sterling, and if he fails to do so, he shall be deemed to have withdrawn from his candidature.

(2) If after the deposit is made, but before the poll is commenced, the candidate dies, the deposit, if made by him, shall be returned to his legal personal representative, or, if not made by him, shall be returned to the person by whom the deposit was made.

Forfeiture of Deposit in certain cases.

21. If a candidate who has made the required deposit is not elected, and the number of votes polled by him does not exceed, in the case of an electoral division returning one Member, ten per cent. of the total number of votes polled, or in the case of an electoral division returning more than one Member, ten per cent. of the total number of votes polled divided by the number of Members to be elected for that electoral division, the amount deposited shall be forfeited to the Colonial Revenue; but in any other case the amount shall be returned to the candidate, where the candidate is elected, as soon as he has taken the oath, affirmation or declaration as a Member, and where the candidate is not elected, as soon as practicable after the result of the election is declared.

Questions as to qualification of Members or vacating of seats to be determined by Supreme Court.

22. All questions which may arise as to the right of any person to be or remain an Elected Member of the Council shall be referred to and decided by the Supreme Court of the Colony.

Seat of Elected Member; how vacated.

23. If any Elected Member of the Council shall, by writing under his hand addressed to the Governor, resign his seat in the Council, or shall become subject to any of the disqualifications specified in Article 19 of these Letters Patent, or shall take any oath or make any declaration of allegiance to any Foreign State or Power, his seat in the Council shall thereupon become vacant.

Absence of Elected Member.

An Elected Member of the Council may, with the permission of the Governor, be absent from the sittings of the Council or from the Colony for a period or periods not exceeding twelve calendar months at any one time; but if any Elected Member shall for any reason be so absent for more than twelve consecutive calendar months, or shall be absent, except on the ground of illness, from the sittings of the Council for a period of two calendar months during the session of the Council, without the leave of the Governor, his seat in the Council shall thereupon become vacant.

Writ for Election to Supply Vacancy.

Whenever the seat of an Elected Member has become vacant, the Governor shall, as soon as possible, issue a writ for the election of a new Member in the place of the Member whose seat has become vacant.

Penalty for Unqualified Persons Sitting or Voting as Members of Council.

24. Every person who, having been returned as a Member of the Council but not having been at the time of his election qualified to be elected, shall sit or vote in the Council, shall for every day on which he shall sit or vote in the Council, and every person who shall sit or vote in the Council after his seat shall have become vacant shall for every day on which he shall sit or vote after his seat shall have become vacant, be liable to a penalty

not exceeding Fifty Pounds, to be recovered by action in the Supreme Court of the Colony by any person who shall sue for the same.

25, 26. (Qualifications of European and Indian Electors.)

. . . . . .

Governor to make Regulations for Registration, etc.

27. The Governor of the Colony shall, as soon as possible after the promulgation of these Letters Patent, establish by proclamation such regulations, not inconsistent with these Letters Patent, as he may think necessary for regulating the registration of electors, and generally in regard to the election of Members of the Legislative Council, and such regulations shall take effect and have the force of law in the Colony immediately on the proclamation thereof; and the provisions of any Letters Patent, Orders in Council, or Ordinances repugnant to the provisions of any such regulations shall be read subject to those regulations, and shall to the extent of such repugnancy be void and inoperative; but any regulations so made may be repealed or altered by any Ordinance or Ordinances hereafter to be enacted by the Governor, with the advice and consent of the Legislative Council, or by any Letters Patent, or Orders in Council which may hereafter be issued or passed.

Until any such regulations shall be made and subject to any regulations to be so made, the regulations now in force shall remain in force and apply, so far as the same are applicable, to the election of Members of the Legislative Council established by these Letters Patent.

Power to make Laws. Style of Ordinances.

28. It shall be lawful for the Governor, with the advice and consent of the Legislative Council, to make laws for the peace, order, and good government of the Colony. Such laws shall be styled "Ordinances enacted by the Governor of Fiji, with the advice and consent of the Legislative Council thereof."

Power of Disallowance reserved to the Crown.

29. We do hereby reserve to Ourselves, Our heirs and successors, power to disallow any such Ordinance, either in whole or in part, such disallowance to be signified to the Governor through a Secretary of State. Every such disallowance shall take effect from the time when the Governor shall have signified the same by proclamation in the *Fiji Royal Gazette*.

Reservation of power to legislate by Order in Council.

30. We do also hereby reserve to Ourselves, Our heirs and successors, Our and their undoubted right, power, and authority to make, by and with the advice of Our or their Privy Council, all such laws for the peace, order, and good government of the Colony as to Us or them may seem necessary, and all such laws shall be of the same force and effect in the Colony as if these Letters Patent had not been made.

Presentation of Bills to the Governor for his assent.

31. When a Bill passed by the Legislative Council is presented to the Governor for his assent he shall, according to his discretion, but subject to the provisions contained in these Our Letters Patent, and to any Instructions addressed to him under the Royal Sign Manual and Signet or through a Secretary of State, declare that he assents thereto, or refuses his assent to the same, or that he reserves the same for the signification of Our pleasure.

Laws not to take effect until assented to.

32. No law shall take effect until either the Governor shall have assented thereto in Our name and on Our behalf, and shall have signed the same in token of such assent, or until We shall have given Our assent thereto by Our Order in Our Privy Council or through a Secretary of State.

Time from which Bills assented to by the Governor are to take effect.

Bills assented to by the Governor shall take effect, and come into operation as law, from and after the date on which such assent shall be given, or on which it shall be enacted that they are to take effect and come into operation as law.

Reserved Bills.

33. The Governor may reserve for the signification of Our pleasure thereon any Bill passed by the Legislative Council, and shall so reserve any such Bill by which any provision of these Our Letters Patent is repealed, altered, or amended, or which is in any way repugnant to or inconsistent with any of the provisions of these Our Letters Patent. A Bill so reserved shall take effect so soon as We shall have given Our assent thereto, either by Our Order in Our Privy Council, or through a Secretary of State, and the Governor shall have signified such assent by Proclamation in the *Fiji Royal Gazette*.

Enrolment of Ordinances.

34. The Governor shall transmit to the Chief Justice of the Colony, to be enrolled in the Supreme Court, a transcript, authenticated under the Public Seal of the Colony, and by his own signature, of every Ordinance passed by the Governor, with the advice and consent of the Legislative Council, and of every Bill reserved by him for the signification of Our pleasure. He shall also from time to time transmit to the Chief Justice, to be enrolled in the said Court, a certificate under his hand and seal, of the effect of every Order or other direction which he may have received from Us for confirming or disallowing, in the whole or in part, the provisions of any such Ordinance or Bill, which certificate shall in like manner be enrolled in the said Court, and there remain on record to the intent that the Judges of the said Court may without further or other proof take cognisance of all Ordinances made and promulgated for the peace, order, and good government of the Colony: Provided always, and We do hereby declare, that the Judges of the said Court have not, and shall not have, any right or authority to prevent or delay the enrolment of any such Ordinance or Bill, and that the validity thereof doth not, and shall not, depend upon such enrolment.

Power to make Standing Orders.

35. Subject to the provisions of these Our Letters Patent and such Instructions as aforesaid, the Legislative Council may from time to time make Standing Rules and Orders for the regulation of its own proceedings, and until any such Rules and Orders shall be made, and subject to any Rules and Orders to be so made, the Standing Rules and Orders of the Legislative Council now in force shall remain in force and apply, so far as the same are applicable thereto, to the Council established by these Letters Patent.

Governor or Member to be appointed by Governor to preside.

36. The Governor, if present, or, in the absence of the Governor, such Member of the Legislative Council as the Governor shall from time to time appoint, or in default of such appointment the Member present who stands first in order of precedence, shall preside at the meetings of the Council. The Governor, or any Member for the time being presiding at a meeting of the Council, shall have a casting vote, but not an original vote.

President to have a Casting Vote but not an Original Vote.

Council may require the aid of the Judges.

37. The Legislative Council may require the aid of any Judge of the Colony in the discussion of any law.

38. All questions arising at meetings of the Legislative Council shall be determined by a majority of the votes of all the Members present, except the Governor or other presiding Member, and in case of an equality of

votes the question shall be determined by the casting vote of the Governor or other presiding Member. Provided that the Governor may disallow any vote or resolution of the Council, and any vote or resolution so disallowed shall have no force or effect. Voting. Governor may disallow any Vote or Resolution.

39. Every Member of the Legislative Council may, upon due notice being given, propose any Ordinance or resolution which does not impose any tax or dispose of or charge any part of the public revenue. Initiation of Ordinances, etc., other than Money Votes.

40. No Member of the Legislative Council may propose any Ordinance, vote or resolution, the object or effect of which is to impose any tax or to dispose of or charge any part of the public revenue, unless such Ordinance, vote, or resolution shall have been proposed by the direction or with the express sanction of the Governor. Initiation of Money Votes.

41. The Legislative Council shall not be disqualified for the transaction of business by reason of any vacancy or vacancies among the Members, but no business except that of adjournment shall be transacted unless there shall be present at least six Members besides the Governor or other presiding Member. Legislative Council may transact business notwithstanding vacancies. Quorum.

42. Subject to the provisions of these Letters Patent the Governor and the Legislative Council shall, in the transaction of the business of the Council, and the passing of, assenting to, and enrolment of Bills or Ordinances, conform as nearly as may be to the directions contained in any Instructions under Our Sign Manual and Signet which may herewith or hereafter be addressed to the Governor in that behalf; but no Ordinance enacted by the Governor, with the advice and consent of the Legislative Council, shall be invalid by reason that in the enactment thereof any such Instructions were not duly observed. Governor and Legislative Council to conform to Royal Instructions.

43. The Sessions of the Legislative Council shall be held at such times and places as the Governor shall from time to time by proclamation appoint. There shall be at least one Session of the Council in every year, and there shall not be an interval of twelve months between the last sitting of one Session and the first sitting of the next following Session. The first Session shall be held within six months from the promulgation of these Letters Patent. Sessions of Legislative Council.

44. The Governor may at any time, by proclamation, prorogue or dissolve the Legislative Council. Prorogation and Dissolution of Legislative Council.

45. The Governor shall dissolve the Legislative Council at the expiration of three years from the date of the return of the first writs at the last preceding general election, if it shall not have been sooner dissolved. Duration of Legislative Council.

46. A general election of members of the Legislative Council shall be held at such time not more than six months after the coming into operation of these Our Letters Patent, and unless We shall otherwise direct through a Secretary of State, a general election shall be held at such time within three months after every dissolution of the Legislative Council, as the Governor shall by proclamation appoint. General Elections.

47. The Governor, in Our name and on Our behalf, may make and execute under the Public Seal of the Colony grants and dispositions of any lands or other immovable property which may be lawfully granted and disposed of by Us within the Colony, provided that every such grant or disposition be made in conformity with some law in force in the Colony, or with some Instructions addressed to the Governor under Our Sign Grant of Lands. Proviso. Land Grants to be made in conformity with the Laws.

Manual and Signet, or through a Secretary of State, or in conformity with such Regulations as are now in force or may be made by the Governor in that behalf and duly published in the Colony.

Governor authorised to appoint Judges, Commissioners, Justices of the Peace, etc.

48. The Governor may constitute and appoint all such Judges, Commissioners, Justices of the Peace, and other Officers as may lawfully be appointed by Us, all of whom, unless otherwise provided by law, shall hold their offices during Our pleasure.

Dismissal and Suspension of Officers.

49. The Governor may, upon sufficient cause to him appearing, dismiss any public officer not appointed by virtue of a Warrant from Us, whose pensionable emoluments do not exceed one hundred pounds sterling a year in the case of an officer appointed to an office in the Colony before the date of the coming into operation of these Our Letters Patent, or two hundred pounds sterling a year in the case of an officer appointed to an office in the Colony on or after that date, provided that in every such case unless the officer has been convicted on a criminal charge the grounds of intended dismissal are definitely stated in writing, and communicated to the officer in order that he may have full opportunity of exculpating himself, and that the matter is investigated by the Governor with the aid of the head for the time being of the department in which the officer is serving. If such an officer is convicted on a criminal charge, the Governor may call for the records of the trial and form his decision thereon, with the assistance, if necessary, of the officer who tried the case.

The Governor may, upon sufficient cause to him appearing, also suspend from the exercise of his office any person holding any office in the Colony whether appointed by virtue of any Commission or Warrant from Us, or in Our name, or by any other mode of appointment. Such suspension shall continue and have effect only until Our pleasure therein shall be signified to the Governor. If the suspension is confirmed by a Secretary of State, the Governor shall forthwith cause the officer to be so informed, and thereupon his office shall become vacant. In proceeding to any such suspension, the Governor is strictly to observe the directions in that behalf given to him by Our Instructions.

Grant of Pardons, etc.

Remission of Fines.

50. When any crime or offence has been committed within the Colony, or for which the offender may be tried therein, the Governor may, as he shall see occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime or offence, who shall give such information and evidence as shall lead to the conviction of the principal offender or of any one of such offenders if more than one; and further, may grant to any offender convicted of any crime or offence in any Court, or before any Judge, Justice, or Magistrate, within the Colony, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence, for such period as the Governor thinks fit, and may remit any fines, penalties, or forfeitures which may become due and payable to Us.

Succession to the Government.

51. Whenever the office of Governor is vacant, or if the Governor becomes incapable or is absent from the limits of his Government, or is from any cause prevented from acting in the duties of his office, such person or persons as may be appointed under the Royal Sign Manual and Signet, and, in case there shall be no person or persons within the Colony so

appointed, then the Senior Member of the Executive Council then resident in the Colony, and capable of discharging the duties of administration, shall, during Our pleasure, administer the Government of the Colony, first taking the oaths hereinbefore directed to be taken by the Governor, and in the manner herein prescribed, which being done, We do hereby authorise, empower and command any such Administrator as aforesaid, to do and execute, during Our pleasure, all things that belong to the office of Governor and Commander-in-Chief, according to the tenour of these Our Letters Patent, and according to Our Instructions as aforesaid, and the laws of the Colony. Provided always, that the Governor during his passage from one Island of the Colony to another, or while visiting or residing at any place within any such Island, or during his absence from the Colony in the execution of any Commission or other authority under the Pacific Order in Council, 1893, or any similar Order, shall not for any of the purposes aforesaid be considered as being absent from the limits of his said Government.

Appointment of Deputies to Governor.

52. During his temporary absence for a short period from the seat of Government, but while he is within the limits of his said Government as aforesaid, or during his absence from the Colony in the execution of any Commission or other authority under the Pacific Order in Council, 1893, or any similar Order, the Governor may, by an instrument under the Public Seal of the Colony, appoint any person or persons to be his Deputy or Deputies within any part or parts of the Colony, and in that capacity to exercise, perform and execute, for and on behalf of the Governor during such absence, but no longer, all such powers and authorities vested in the Governor, as shall in and by such instrument be specified and limited, but no others. Every such Deputy shall conform to and observe all such Instructions as the Governor shall from time to time address to him for his guidance. Provided, nevertheless, that by the appointment of a Deputy or Deputies as aforesaid, the power and authority of the Governor shall not be abridged, altered, or in any way affected, otherwise than We may at any time hereafter think proper to direct.

All persons called upon to be obedient, aiding, and assisting to the Governor.

53. We do hereby require and command all officers, civil and military, and all other the inhabitants of the Colony, to be obedient, aiding, and assisting unto the Governor.

Publication of Letters Patent.

54. We do further direct and enjoin that these Our Letters Patent shall be read and proclaimed at such place or places within the Colony as the Governor shall think fit, and shall come into operation on a day to be fixed by the Governor by proclamation.

. . . . . .

Power reserved to His Majesty to revoke, alter or amend the present Letters Patent.

56. And We do hereby reserve to Us, Our heirs and successors, full power and authority, from time to time, to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem meet.

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the Ninth day of February, in the Nineteenth year of Our Reign.

By warrant under the hands of the Counsellors of State.

SCHUSTER.

INSTRUCTIONS TO GOVERNOR OF COLONY.

Dated 9th February, 1929.

Instructions passed under the Royal Sign Manual and Signet to the Governor and Commander-in-Chief of the Colony of Fiji.

Signed on behalf of His Majesty the King : [1]—
EDWARD P.
ALBERT.
STANLEY BALDWIN.

INSTRUCTIONS to Our Governor and Commander-in-Chief in and over Our Colony of Fiji, or, in his absence, to the Officer for the time being administering the Government of Our said Colony.

Preamble.

Recites Letters Patent constituting the office of Governor.

WHEREAS by certain Letters Patent, bearing even date herewith, We have constituted, ordered and declared that there shall be a Governor and Commander-in-Chief (hereinafter called the Governor) in and over Our Colony of Fiji as defined in the said Letters Patent (hereinafter called the Colony), And We have thereby authorised the Governor to do and execute in due manner all things that belong to his said office according to the several powers and authorities granted or appointed him by virtue of Our said Letters Patent and of such Commission as may be issued to him under the Royal Sign Manual and Signet, and to such other powers and authorities, being still in force, as may have been heretofore given to any of his predecessors in his said office, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through a Secretary of State, and according to such Laws as are now or shall hereafter be in force in the Colony:

And whereas We are minded to issue these Our Instructions under Our Sign Manual and Signet for the guidance of the Governor or other Officer administering the Government of the Colony:

Revokes Instructions of 31st January, 1914.

We do hereby revoke, as from the date of the coming into force of Our above recited Letters Patent of even date, the Instructions under Our Sign Manual and Signet bearing date the Thirty-first day of January 1914, but without prejudice to anything lawfully done thereunder, and We do direct and enjoin and declare Our Will and Pleasure as follows:—

Administration of Oaths.

1. The Governor may, whenever he thinks fit, require any person in the public service of the Colony to take the Oath of Allegiance, in the form prescribed by the Act mentioned in Our said Letters Patent, together with such other Oath or Oaths as may from time to time be prescribed by any laws in force in the Colony. The Governor is to administer such Oaths or cause them to be administered by some public officer of the Colony.

Instructions to be observed by Deputies.

2. During the absence of the Governor from the Colony these Our Instructions, so far as they apply to any matter or thing to be done, or to any power or authority to be exercised by a Deputy acting for the Governor, shall be deemed to be addressed to and shall be observed by such Deputy.

Deputies may correspond direct with Secretary of State in urgent cases.

3. If in any emergency arising in the Colony during the absence of the Governor it is necessary that Instructions should be obtained from Us without delay, the Deputy (if any) acting for the Governor may apply to Us, through a Secretary of State, for instructions in the matter: but every such Deputy shall forthwith transmit to the Governor a copy of every despatch or communication which he has so addressed to Us.

[1] Signed by three of the Counsellors of State appointed to act for the King during illness (Part IV., Chap. 1).

4. The Executive Council of the Colony shall consist of the persons for the time being lawfully discharging the functions of the respective offices of Colonial Secretary, Attorney-General, and Colonial Treasurer of the Colony, who shall be styled *ex officio* Members of the Executive Council, and of such other persons as are now Members of the said Council, or as We may from time to time appoint by any Instructions or Warrant under Our Sign Manual and Signet, or as the Governor, in pursuance of Instructions from Us, through a Secretary of State, may from time to time appoint by an instrument under the Public Seal of the Colony. Constitution of Executive Council.

Whenever upon any special occasion the Governor desires to obtain the advice of any person within the Colony touching Our affairs therein, he may, by an instrument under the Public Seal of the Colony, summon for each special occasion any such person as an Extraordinary Member of the Executive Council. Extraordinary Members.

5. Every Member, other than an *ex officio* Member, of the Executive Council shall vacate his seat in the Council at the end of five years from the date of the instrument by which or in pursuance of which he is appointed, or at such earlier date or at the end of such shorter period as may be provided by that instrument. Vacation of Seats.

Provided that if any such Member is provisionally appointed to fill a vacant seat in the Council, and his provisional appointment is immediately followed by his definitive appointment, the aforesaid period of five years shall be reckoned from the date of the instrument provisionally appointing him.

Every such Member shall be eligible to be re-appointed by the Governor by an instrument under the Public Seal of the Colony for a further term or terms, each not exceeding five years, subject to Our approval conveyed through a Secretary of State. Re-appointment of Members.

. . . . . .

7. The Governor may, by an instrument under the Public Seal of the Colony, suspend any person from the exercise of his functions as a Member of the Executive Council. Every such suspension shall be forthwith reported by the Governor to a Secretary of State and shall remain in force, unless and until it shall either be removed by the Governor by an instrument under the said Seal or disallowed by Us through a Secretary of State. Suspension of Members.

. . . . . .

11. The Executive Council shall not proceed to the despatch of business unless duly summoned by authority of the Governor, nor unless two Members at the least (exclusive of the Governor or of the Member presiding) be present and assisting throughout the whole of the meetings at which any such business shall be despatched. Executive Council not to proceed to business unless summoned by the Governor's authority.

12. The Governor shall attend and preside at all meetings of the Executive Council, unless when prevented by illness or other grave cause, and in his absence such Member as the Governor may appoint, or in the absence of such Member, or if no such Member be appointed, the senior Member of the Council actually present shall preside. Quorum. Governor to attend and preside.

13. A full and exact Journal or Minute shall be kept of all the proceedings of the Executive Council; and at each meeting of the Council the Minutes of the last preceding meeting shall be confirmed or amended, as the case may require, before proceeding to the despatch of any other Journals or Minutes of the Executive Council to be kept.

To be transmitted home twice a year.

business. Twice in each year a full and exact copy of all Minutes for the preceding half year shall be transmitted to Us through a Secretary of State.

Governor to consult Executive Council except in specified cases.

14. In the execution of the powers and authorities granted to the Governor by Us he shall in all cases consult with the Executive Council, excepting only in cases which are of such a nature that, in his judgment, Our service would sustain material prejudice by consulting the Council thereupon, or when the matters to be decided are too unimportant to require their advice, or too urgent to admit of their advice being given by the time within which it may be necessary for him to act in respect of any such matters. In all such urgent cases he shall, within the earliest practicable period, communicate to the Executive Council the measures which he may so have adopted, with the reasons thereof.

Proviso : Urgent cases.

Governor alone entitled to submit questions.

15. The Governor shall alone be entitled to submit questions to the Executive Council for their advice or decision ; but if he decline to submit any question to the Council when requested in writing by any Member so to do, it shall be competent to such Member to require that there be recorded upon the Minutes his written application, together with the answer returned by the Governor to the same.

Governor may act in opposition to Executive Council.

16. The Governor may act in opposition to the advice given to him by the Members of the Executive Council, if he shall in any case deem it right to do so ; but in any such case he shall fully report the matter to Us, by the first convenient opportunity, with the grounds and reasons of his action. In every such case it shall be competent to any Member of the Council to require that there be recorded at length on the Minutes the grounds of any advice or opinion he may give upon the question.

Reporting the grounds for so doing. Members may require to be recorded on Minutes their adverse opinions.

Suspension of Officers.

17. Before suspending from the exercise of his office any public Officer, whose annual pensionable emoluments exceed £100 sterling in the case of an Officer appointed to an office in the Colony before the date of the coming into operation of Our above recited Letters Patent bearing even date herewith, or £200 sterling in the case of an Officer appointed to an office in the Colony on or after such date, the Governor shall signify to such Officer, by a statement in writing, the grounds of the intended suspension, and shall call upon him to state in writing the grounds upon which he desires to exculpate himself ; and if the Officer does not furnish such statements within the time fixed by the Governor, or fails to exculpate himself to the satisfaction of the Governor, the Governor shall appoint a Committee of the Executive Council to investigate the charges made and to make a full report to the Executive Council. The Governor shall forthwith cause such report to be considered by the Council, and shall cause to be recorded on the Minutes whether the Council or the majority thereof does or does not assent to the suspension ; and if the Governor thereupon proceed to such suspension, he shall transmit the report of the Committee and the evidence taken by it, together with the Minutes of the proceedings of the Council, to Us through a Secretary of State, at the earliest opportunity. But if in any case the interests of Our service shall appear to the Governor to demand that a person shall cease to exercise the powers and functions of his office instantly, or before there shall be time to take the proceedings hereinbefore directed, he shall then

interdict such person from the exercise of the powers and functions of his office.

Rules and Regulations under which Laws are to be enacted.

18. In the making of Ordinances within the Colony the Governor and Legislative Council shall observe, as far as practicable, the following Rules:—

Ordinances to be numbered and methodically arranged.

(1) All Ordinances shall be distinguished by titles, and shall be divided into successive clauses or paragraphs consecutively numbered, and to every such clause there shall be annexed in the margin a short summary of its contents. The Ordinances of each year shall be distinguished by consecutive numbers, commencing in each year with the number one.

Except in the case of Bills reserved for the signification of Our pleasure, all Ordinances passed by the Legislative Council in any one year shall, if assented to by the Governor, be assented to by him in that year, and shall be dated as of the day on which the assent of the Governor is given, and shall be numbered as of the year in which they are passed. Ordinances not so assented to by the Governor, but reserved by him for the signification of Our pleasure shall be dated as of the day and numbered as of the year on and in which they are brought into operation.

Different subjects not to be mixed in the same Ordinance.

(2) Each different matter shall be provided for by a different Ordinance without intermixing in one and the same Ordinance such things as have no proper relation to each other; and no clause is to be inserted in or annexed to any Ordinance which shall be foreign to what the title of such Ordinance imports, and no perpetual clause shall be part of any temporary Ordinance.

No clause to be introduced foreign to what the title of the Ordinance imports.

Temporary Ordinances.

Description of Bills not to be assented to.

19. The Governor shall not (except in the cases hereunder mentioned) assent in Our name to any Bill of any of the following classes:—

(1) Any Bill for the divorce of persons joined together in holy Matrimony;

(2) Any Bill whereby any grant of land or money, or other donation or gratuity, may be made to himself;

(3) Any Bill affecting the Currency of the Colony, or relating to the issue of Bank Notes;

(4) Any Bill establishing any Banking Association, or amending or altering the constitution, powers, or privileges of any Banking Association;

(5) Any Bill imposing differential duties;

(6) Any Bill, the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty;

(7) Any Bill interfering with the discipline or control of Our forces by sea, land or air;

(8) Any Bill of an extraordinary nature and importance, whereby Our prerogative or the rights and property of Our subjects not residing in the Colony, or the trade and shipping of Our dominions, may be prejudiced;

(9) Any Bill whereby persons not of European birth or descent may be subjected or made liable to any disabilities or restrictions to which

persons of European birth or descent are not also subjected or made liable;

(10) Any Bill containing provisions to which Our assent has been once refused, or which have been disallowed by Us;

Proviso in cases of emergency for immediate operation of a Bill.

unless the Governor shall previously have obtained Our Instructions upon such Bill through a Secretary of State, or unless such Bill shall contain a clause suspending the operation of such Bill until the signification in the Colony of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorised to assent in Our name to such Bill unless the same shall be inconsistent with any obligations imposed on Us by Treaty. But he is to transmit to Us by the earliest opportunity the Bill so assented to, together with his reasons for assenting thereto.

Private Bills.

20. Every Bill intended to affect or benefit some particular person, association, or corporate body shall contain a section saving the rights of Us, Our heirs and successors, all bodies, politic and corporate, and all others, except such as are mentioned in the Bill, and those claiming by, from, or under them. No such Bill, not being a Government measure, shall be introduced into the Legislative Council until due notice has been given by three successive publications of the Bill in the *Fiji Royal Gazette*; and the Governor shall not assent thereto in Our name unless it has been so published. A certificate under the hand of the Governor shall be transmitted with the Bill signifying that such publication has been made.

Ordinances to be sent home duly authenticated.

21. When any Ordinance shall have been passed, or when any Bill shall have been reserved for the signification of Our pleasure, the Governor shall forthwith lay it before Us for Our approval, disallowance, or other direction thereupon and shall transmit to Us through a Secretary of State a transcript in duplicate of the same, together with a marginal abstract thereof, duly authenticated under the Public Seal of the Colony, and by his own signature. Such transcript shall be accompanied by such explanatory observations as may be required to exhibit the reasons and occasion for passing such Ordinance or Bill.

Collection of Ordinances to be published every year.

22. In the month of January, or within the earliest practicable period after the commencement of each year, the Governor shall cause a complete collection to be published, for general information, of all Ordinances enacted during the preceding year.

Minutes of Proceedings of Legislative Council to be kept and sent home after every meeting.

23. Minutes shall be regularly kept of all the proceedings of the Legislative Council, and at each meeting of the said Council the Minutes of the last preceding meeting shall be confirmed or amended, as the case may require, before proceeding to the despatch of any other business. The Governor shall transmit to Us through a Secretary of State, as soon as possible after every meeting, a full and exact copy of the Minutes thereof.

Surveys and reservations to be made before waste lands are disposed of. Governor not to purchase lands.

24. Before disposing of any vacant or waste lands to Us belonging, the Governor shall cause the same to be surveyed, and such reservations to be made thereout as he may think necessary for roads or other public purposes. The Governor shall not, directly or indirectly, purchase for himself any of such lands without Our special permission given through a Secretary of State.

Appointments to be provisional and during pleasure.

25. All Commissions to be granted by the Governor to any person for exercising any office or employment shall, unless otherwise provided by law, be granted during pleasure only; and whenever the Governor shall appoint to any vacant office or employment, the initial emoluments of which exceed £200 per annum, any person not by Us specially directed to be appointed thereto, he shall, at the same time, expressly apprise such person that such appointment is to be considered only as temporary and provisional until Our allowance or disallowance thereof be signified.

Regulation of power of Pardon in Capital Cases. Judge's Report to be laid before the Executive Council. Governor to take the advice of the Executive Council in such cases. May exercise his own judgment. Entering his reasons on the Council Minutes.

26. Whenever any offender shall have been condemned to suffer death by the sentence of any Court in the Colony, the Governor shall call upon the Judge who presided at the trial to make to him a written report of the case of such offender, and shall cause such report to be taken into consideration at the first meeting of the Executive Council which may be conveniently held thereafter, and he may cause the said Judge to be specially summoned to attend at such meeting and to produce his notes thereat. The Governor shall not pardon or reprieve any such offender unless it shall appear to him expedient so to do, upon receiving the advice of the Executive Council thereon; but in all such cases he is to decide either to extend or to withhold a pardon or reprieve, according to his own deliberate judgment, whether the Members of the Executive Council concur therein or otherwise; entering, nevertheless, on the Minutes of the Executive Council a Minute of his reasons at length, in case he should decide any such question in opposition to the judgment of the majority of the Members thereof.

Governor to promote Religion and Education.

27. The Governor is, to the utmost of his power, to promote religion and education among the native inhabitants of the Colony; and he is especially to take care to protect them in their persons and in the free enjoyment of their possessions, and by all lawful means to prevent and restrain all violence and injustice which may in any manner be practised or attempted against them; and he is to adopt and support such measures as may appear to him conducive to their civilisation and as tend to the suppression of barbarous customs among such natives.

Blue Book.

28. The Governor shall punctually forward to Us from year to year, through a Secretary of State, the annual book of returns, commonly called the Blue Book, relating to the Revenue and Expenditure, Defence, Public Works, Legislation, Civil Establishments, Pensions, Population, Schools, Course of Exchange, Imports and Exports, Agricultural Produce, Manufactures, and other matter in the said Blue Book more particularly specified, with reference to the state and condition of the Colony.

Governor's absence.

29. Except during his passage to or from any Island included in his Government, or for some urgent reason which he shall without delay communicate to Us, the Governor shall not quit the Colony without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through a Secretary of State, unless for the purpose of visiting the Governor-General of the Commonwealth of Australia, the Governor-General of the Dominion of New Zealand, or the Governor of any Australian State, for periods not exceeding six weeks at any one time, nor exceeding in the aggregate one month for every year of his service in the Colony.

Proviso. May be absent without leave if appointed High Commissioner, etc.

If, nevertheless, We appoint the Governor to be Our High Commissioner of the Western Pacific, or if the said High Commissioner appoint him to any office under the Pacific Order in Council, 1893, or any similar Order, the Governor may quit the Colony without leave from Us, for the purpose of discharging the duties of such appointment.

Terms "Governor" and "Secretary of State" explained.

30. In these Our Instructions, unless inconsistent with the context, the term "the Governor" shall include every person for the time being administering the Government of the Colony, and the term "Secretary of State" means one of Our Principal Secretaries of State.

Given at Our Court at Saint James's this Ninth day of February, 1929, in the Nineteenth Year of Our Reign.

COMMISSION APPOINTING COLONIAL GOVERNOR.

Dated 28th June, 1929. GEORGE R.I.

Commission passed under the Royal Sign Manual and Signet, appointing Sir Arthur George Murchison Fletcher, Kt., C.M.G., C.B.E., to be Governor and Commander-in-Chief of the Colony in Fiji.

George the Fifth, by the Grace of God of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To Our Trusty and Well-beloved Sir Arthur George Murchison Fletcher, Knight, Companion of Our Most Distinguished Order of Saint Michael and Saint George, Commander of Our Most Excellent Order of the British Empire, Greeting.

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said Sir Arthur George Murchison Fletcher, to be, during Our pleasure, Our Governor and Commander-in-Chief in and over Our Colony of Fiji, with all the powers, rights, privileges and advantages to the said Office belonging or appertaining.

Appointment of Sir A. G. M. Fletcher, Kt., C.M.G., C.B.E., to be Governor.

II. And We do hereby authorise, empower, and command you to exercise and perform all and singular the powers and directions contained in any Letters Patent for the time being in force relating to Our said Colony, according to such Orders and Instructions as the Governor and Commander-in-Chief for the time being of Our said Colony hath already received, or as you may hereafter receive from Us.

Powers, etc., under Letters Patent. Instructions.

Commission of 15th January, 1925, superseded.

III. And further We do hereby appoint that, so soon as you shall have taken the prescribed Oaths and have entered upon the duties of your Office, this Our present Commission shall supersede Our Commission under Our Sign Manual and Signet bearing date the Fifteenth day of January, 1925, appointing Our Trusty and Well-beloved Sir Eyre Hutson, Knight Commander of Our Most Distinguished Order of Saint Michael and Saint George, to be Our Governor and Commander-in-Chief in and over Our Colony of Fiji.

Officers, etc., to obey Governor

IV. And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said Colony, and all others whom it may concern, to take due notice hereof and to give their ready obedience accordingly.

Given at Our Court at Saint James's, this Twenty-eighth day of June, 1929, in the Twentieth Year of Our Reign.

By His Majesty's Command,

PASSFIELD.

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